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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES E. MITCHELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1937
CERTIORARI GRANTED OCTOBER 11, 1937

SUPREME COURT OF THE UNITED STATES

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No. 324

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

VS.

CHARLES E. MITCHELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 74,720

CHARLES E. MITCHELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances:
For Petitioner: Leonard Moore, Esq., Robert Reed, Esq., Wm. Wallace, Esq.
For Respondent: E. S. Greenbaum, Esq., J. D. Head, Esq., Thos. E. Dewey, Esq., Nathan Gammon, Esq.
Transferred to Mr. Van Fossan 5/14/35.

1934

Jan. 19—Petition received and filed. Taxpayer notified. (Fee paid.)
Jan. 19—Copy of petition served on General Counsel.
Mar. 8—Answer filed by General Counsel.
Mar. 13—Copy of answer served on taxpayer.
Apr. 17—Hearing set April 30, 1934.
Apr. 24—Application for subpoena of Isidor Willing, Aaron W. Reade, R. M. Byrnes, et al., filed by taxpayer.
Apr. 24—Subpoena issued (2) Aaron Reade and Isidor Willing.
Apr. 24—Application for subpoena of Black, Galle, Robbins, Carlisle, Cary, Baker, Forbes, Grace, Millikan and Swope, filed by taxpayer. April 24, 1934, subpoenas issued.
2 Apr. 24—Application for subpoena of Ronald M. Byrnes filed by taxpayer. April 24, 1934, subpoena issued.
Apr. 24—Application for subpoena of Department of Taxes and Assessments of City of New York filed by taxpayer. April 24, 1934, subpoena issued.
Apr. 24—Application for subpoena of Swaine, Swenson, Winston, Winthrop, Moss, Summers, Hradilek, Levine, Fox, Murphy, filed by taxpayer. April 24, 1934, subpoenas issued.
Apr. 30, May 1, 2, 3, 4—Hearing had before Mr. Adams, Mr. Van Fossan and Mr. Lansdon on merits. Corrected stipulation of facts to be filed later. Notice of appearance of Leonard Moore and Robert Reed filed at hearing. Petitioner's brief due July 30, 1934—Commissioner's brief due July 2, 1934—August 13, 1934, to reply.
May 7—Transcript of hearing April 30, 1934, and May 1, 1934, filed.
May 11—Transcript of hearing May 2, 1934, filed.
May 11—Transcript of hearing May 3 and 4, 1934, filed.
May 23—Corrected stipulation of facts filed.
June 27—Stipulation to correct transcript filed.
July 2—Brief filed by General Counsel.

July 20—Motion for leave to conform the pleadings to the proof, or in the alternative, to file a reply nunc pro tunc, filed by taxpayer. August 6, 1934, granted.

3 July 23—Order setting motion for argument August 6, 1934, entered.

July 24—Motion for extension to August 15, 1934, to file brief filed by taxpayer. July 24, 1934, granted.

Aug. 4—Memorandum in opposition to motion of July 20, 1934—motion for leave to conform pleadings to the proof, or in the alternative, to file a reply nunc pro tunc—filed by General Counsel.

Aug. 6—Hearing had before Messrs. Adams and Van Fossan on petitioner's motion to amend to conform to proof—Commissioner objects—granted. Petitioner's brief filed—petitioner's reply to be filed later.

Aug. 8—Reply to answer filed by taxpayer. August 9, 1934, copy served.

Aug. 10—Transcript of hearing August 6, 1934, filed.

Aug. 15—Brief filed by taxpayer. August 15, 1934, copy served.

Aug. 17—Motion for extension to September 8, 1934, to file reply brief filed by General Counsel.

Aug. 17—Motion granted.

Aug. 20—Respondent's request for findings of fact filed.

Aug. 30—Proposed findings of fact filed by taxpayer.

Sept. 6—Reply brief filed by General Counsel—3 copies, 17 copies received September 7, 1934.

Sept. 15—Motion for leave to file a reply brief on behalf of the petitioner filed by Wm. Wallace—reply brief lodged.

4 Sept. 18—Order that petitioner be granted permission to file a reply brief limited to matters urged in respondent's reply, entered.

Sept. 21—Reply brief filed by taxpayer. September 21, 1934, copy served.

Oct. 10—Stipulation correcting stenographic minutes filed.

1935

Aug. 6—Findings of fact and opinion rendered—Ernest H. Van Fossan, Division 9. Decision will be entered under Rule 50.

Aug. 27—Notice of settlement filed by General Counsel.

Aug. 29—Hearing set September 18, 1935, on settlement.

Sept. 17—Consent to settlement filed by taxpayer.

Sept. 20—Decision entered—Mr. Van Fossan, Division 9.

Dec. 4—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Dec. 4—Proof of service filed.

Dec. 20—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by General Counsel.

Dec. 21—Proof of service filed (3).
1936
Jan. 15—Motion for extension of 60 days to complete and transmit record filed by taxpayer.
5 Jan. 15—Order enlarging time to April 18, 1936, to prepare and deliver record entered.
Apr. 9—Motion for extension to, May 30, 1936, to prepare and and transmit record filed by taxpayer.
Apr. 9—Order enlarging time to June 1, 1936, to prepare and deliver record entered.
May 20—Copy of an order from United States Circuit Court of Appeals, Second Circuit, directing that the rule requiring statement of evidence to be in narrative form be and the same hereby is dispensed with, and that such statement of evidence and the printed record may contain in whole or in part in question and answer form the testimony given before the Board of Tax Appeals; and for transmission of certain original exhibits, filed.
May 21—Motion for extension to August 12, 1936, to prepare and transmit record filed by taxpayer.
May 21—Order enlarging time to August 12, 1936, for preparation and delivery of record entered.
July 17—Agreed statement of evidence lodged.
July 17—Praecipe with proof of service thereon filed.
July 31—Agreed statement of evidence approved and ordered filed.

6 Before United States Board of Tax Appeals

Docket No. 74,720

CHARLES E. MITCHELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition

Filed Jan. 19, 1934

The above named Petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Bureau symbols appearing in said Notice of Deficiency are IT:E:AJ:RJS–21414–60D), dated December 8, 1933, and as a basis of his proceeding alleges as follows:

(1) The Petitioner is an individual, residing at Tuxedo Park, New York.

(2) The Notice of Deficiency (copy of which is attached and marked "Exhibit A") was mailed to the Petitioner on December 8, 1933.

(3) The amounts in controversy are income taxes and penalties for the calendar years 1929 and 1930, in the amount of $1,275,644.52, being the alleged tax and penalty set out in the Notice of Deficiency as follows:

7 Year	Alleged deficiency in tax	Alleged penalty	Total
1929	$728,709.84	$364,354.92	$1,093,064.76
1930	121,719.84	60,859.92	182,579.76
Totals	850,429.68	425,214.84	1,275,644.52

(4) The determination of tax and penalty set forth in said Notice of Deficiency is based upon the following errors:

(a) Error in holding that, or proceeding as if, the assessment and collection of the said amount of $1,275,644.52, or any part thereof, have not been barred by the Statute of Limitations under Section 275 of the Revenue Act of 1928;

(b) Error in holding that, or proceeding as if, the returns filed by the Petitioner for the calendar years 1929 and 1930 were false or fraudulent returns with intent to evade tax within the meaning of Section 276 (a) of the Revenue Act of 1928;

(c) Error in holding that, or proceeding as if, any part of the alleged deficiency in tax for said calendar years 1929 and 1930 is due to fraud with intent to evade tax within the meaning of Section 293 (b) of the Revenue Act of 1928, and that the Petitioner is subject to a penalty in the amount of $425,214.84 or in any other amount;

(d) Error in holding that, or proceeding as if, the assertion of said deficiency in tax and/or penalty for said calendar years
8 1929 and or 1930 has not been barred by the verdict of the jury and the adjudication in the case of United States v. Charles E. Mitchell, in favor of the Petitioner.

(e) Error in holding that, or proceeding as if, the Respondent's determinations do not constitute a violation of the Petitioner's rights under the Constitution of the United States and the amendments thereto in subjecting the Petitioner to double jeopardy;

(f) Error in holding that, or proceeding as if, the Petitioner had a taxable net income in the amount of $3,466,324.02, or in any other amount, for the calendar year 1929;

(g) Error in holding that, or proceeding as if, the amount of $666,666.67, received by the Petitioner from The National City Company on or about July 1, 1929, constituted taxable income to the Petitioner;

(h) Error in holding that, or proceeding as if, the Petitioner did not realize a deductible loss in the amount of $2,872,305.50 upon the sale of 18,300 shares of the capital stock of The National City Bank of New York on December 20, 1929;

(i) Error in holding that, or proceeding as if, the Petitioner had a taxable net income for the calendar year 1930, in the amount of $624,637.89, or any other amount in excess of $8,552.40, the
9 amount of net income reported in the Petitioner's return for said year;

(j) Error in holding that, or proceeding as if, the Petitioner did not realize a deductible loss of $758,918.25, upon the sale of 8,500 shares of the capital stock of Anaconda Copper Mining Company on December 26, 1930.

(5) The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner filed his income tax return for the calendar year 1929, on or about March 15, 1930. Petitioner filed his income tax return for the calendar year 1930 on or about March 15, 1931. The 60-day deficiency letter was mailed on December 8, 1933, more than two years after either of said dates. Neither of said returns was a false or fraudulent return with intent to evade tax but on the contrary the Petitioner honestly believed and still believes that each of said returns was a true and correct return in accordance with the law. Accordingly, the assessment and/or collection of income taxes for either of said years was barred by the Statute of Limitations at the time of the mailing of the 60-day letter, under the provisions of Section 275 of the Revenue Act of 1928.

The Management Fund Payment of $666,666.67 on July 1, 1929

(b) From in or about the year 1917, until his appointment
10 as Chairman, on or about April 2, 1929, the Petitioner was the President and a director of The National City Company of New York (hereinafter referred to as the "Company"), and the Petitioner continued to hold his position as a director after he had been made Chairman.

(c) On or about February 8, 1921, the Board of Directors of the Company, by resolution duly adopted by the Board, created a fund to be set aside out of the profits of the Company, which fund was to be distributed amongst certain officers of the Company as extra compensation. This fund was computed in the following manner:

From the net profits after reserves for depreciation, insurance and corporate, federal and state taxes, a sum equal to 8% on the average quarter year aggregate of capital, surplus and undivided profits was deducted. Of the balance remaining 20% was to be set aside as a Management Fund for distribution to the President, Vice Presidents, and Assistant to the President as follows:

One-half of the fund was to be distributed in accordance with fixed percentages established by the Executive Committee at the beginning of each year;

The remaining one-half was to be distributed to such persons "holding office at the close of the year" as the Executive Committee

might determine on the basis of the respective contribution of each of such individual officers during the year for the advancement of the Company's interest.

11 All matters pertaining to the fund were unrestrictedly within the discretion of the Executive Committee.

A provision for advances from the fund was specifically made by vesting the Executive Committee with the power to make payments on account prior to a final establishment of the amount payable to each officer at the end of the year.

(d) The Management Fund continued in effect without material modification until 1927, when it was modified to provide that a reserve account should be set up out of current earnings and that a deduction should be made each month from such current earnings which should be credited to the Management Fund. It was further provided that "these resolutions shall not be construed as a contract or creating vested rights." The plan as modified in 1927 was in effect during the year 1929.

(e) During the first six months of 1929 there was accumulated in the Management Fund the sum of approximately $2,900,000. On or about June 25, 1929, the directors duly authorized a distribution from said fund of $2,000,000 to be distributed amongst the officers entitled to participate therein in accordance with percentages fixed by said Board in January 1929. Of this distribution the Petitioner received as his distributive share the sum of $666,666.67.

(f) At or about the time of distribution the profits of the Company for the first six months of 1929 were approximately $18,-078,262.06, and of which amount the Management Fund's

12 allocable share as then computed, based upon such profits, was $2,739,719.

(g) As a result of the sharp decline in the market prices of securities in October, November, and December, 1929, the Company lost substantial sums of money, so that the profits previously earned in 1929 were almost entirely wiped out.

(h) Early in December 1929 it became apparent to the Company that there would be no profits for the year 1929, which would leave any sum whatsoever available for the Management Fund. The July 1, 1929, distributions, by reason of these subsequent developments, could not be construed as firm payments but only as advances or overpayments. Confronted with this situation the Company sought legal counsel. After due consideration, the Company decided to have each Management Fund participant execute a document, acknowledging the overpayment of July 1, 1929, and stating that this sum was to be repaid out of future additions to the Management Fund, and such a document was executed by all the participants in the Management Fund, the date of execution thereof by the Petitioner being on or about December 30, 1929.

(i) From the commencement of the Management Fund in 1921, and for each year until the abnormal security market decline in the

latter part of 1929, the Company had earned substantial profits in each and every year, permitting large distributions from the Management Fund. When such documents were prepared by
13 the Company and executed by the participants in the Management Fund, it was contemplated that such a condition could not fail to continue during the ensuing years so that repayment of the July 1, 1929, advances would be a certainty.

(j) By resolution of December 30, 1929, the Board of Directors of the Company resolved that the share which each of the executives of the Company had received in the July 1, 1929, distribution should be debited against each of such officers on the books of the Company, to be repaid by each of them out of any distributive share to which they might be entitled in any year subsequent to the year 1929. The sum of $666,666.67 was, accordingly, debited against the Petitioner on the books of the Company.

(k) The obligations of the participants, including the Petitioner, to make repayments as aforesaid, were entered as Accounts Receivable in the Company's accounts.

(l) Thereafter the Company, in connection with its income tax return for the year 1929, consulted counsel as to the treatment to be given to the Management Fund payments made as of July 1, 1929. After consideration of the question, counsel advised the Company that the Company could not take credit for the amounts so paid to officers, that these sums did not constitute taxable income for the year 1929, and that the officers were not required under the law to report the same. In accordance with the annual practice of the Company, notices were sent to each of the officers and em-
14 ployees advising them of the amount of income which they had received from the company during the previous calendar year, which was the amount which the Company was reporting to the Government as the income paid to each officer and employee. The Petitioner received such a notice from the Company, which notice set forth the amount of the Petitioner's income from the Company for the year 1929 as $510,629.28, which amount did not include the distribution of $666,666.67, from the Management Fund.

(m) The Petitioner himself, prior to the filing of his income tax return for the calendar year 1929, sought legal advice and was advised by counsel, after a full and complete disclosure of the facts, that the Management Fund payment of July 1, 1929, did not constitute taxable income to him for the calendar year 1929.

(n) Acting upon such advice of counsel, and believing in good faith that said distribution of $666,666.67 to him did not constitute taxable income, the Petitioner, without intent to evade income taxes lawfully due, did not include said distribution to him of the said $666,666.67, in his return of taxable income for the calendar year 1929.

The Sale to Mrs. Elizabeth R. Mitchell

(o) On December 20, 1929, the Petitioner sold to his wife, Elizabeth R. Mitchell, 18,300 shares of capital stock of The National City Bank. This stock had been purchased by him on October 29, 1929, for $6,751,905.50. The stock was sold for $3,879,600, or $212 per share, the then prevailing market price. The Petitioner realized a deductible loss on the 18,300 shares of $2,872,305.50. The facts and circumstances in connection with the acquisition and sale of the 18,300 shares were as follows:

(p) On or about October 1, 1929, The National City Bank of New York and Corn Exchange Bank Trust Company entered into an agreement of consolidation, subject, however, to ratification by the shareholders of the two banks at a meeting to be held on November 7, 1929. In connection with the transaction, The National City Company agreed with the Corn Exchange Bank Trust Company to purchase at $360 per share in cash any shares of Corn Exchange Bank Trust Company stock which might be tendered to them within twenty days after the effective date of the consolidation. The agreement of consolidation provided a basis of exchange of four shares of National City Bank stock for each five shares of Corn Exchange stock, so that The National City Company was, in fact, agreeing to buy National City Bank stock at $450 per share. The effect of the transaction was that The National City Bank stock would have to continue to sell at more than $450 per share until twenty days after the effective date of the consolidation, else the Corn Exchange stockholders would in large numbers elect to take cash in the consolidation rather than National City Bank stock.

(q) The Petitioner was absent from this country from approximately September 20, 1929, to October 22, 1929. Beginning two days after his return, substantial declines took place in the market prices of securities, including bank stocks. On October 28, 1929, the Company, in order to protect the above mentioned merger and in an endeavor to keep National City Bank stock from selling under $450 a share, purchased large quantities of National City Bank stock on the market at that price or better. The Petitioner was advised at the close of that day that over 71,000 shares of National City Bank stock had been purchased at a cost of over $32,000,000.

(r) Since in the Petitioner's opinion it would have been inexpedient for further purchases of City Bank stock to be made by the Company, and, since it was equally apparent that, if no orders were placed in the market on October 29, 1929, a break might occur, which would create a panic which might affect the Bank itself, the Petitioner decided to use his own personal resources to purchase National City Bank stock, thereby providing purchase orders which would have the effect of letting the market down gradually and thus avoid a possible panic.

(s) At that time the Petitioner owned outright 35,000 shares of National City Bank stock, which he had accumulated over a period of time. These shares constituted the bulk of his personal fortune.

(t) On October 29, 1929, in accordance with this plan, the Petitioner arranged with J. P. Morgan & Company for a loan up to $12,000,000, to be secured by National City Bank stock, a loan
17 value of $200 per share being fixed for the collateral.

(u) Thereupon the Company for this purpose purchased for the Petitioner's account, on October 29, 1929, an aggregate of 28,300 shares of City Bank stock at an average cost of $367.0028 per share.

(v) On October 30, 1929, 10,000 shares of such stock were delivered by the Company to J. P. Morgan & Company for the Petitioner's account against payment to the Company of $3,634,274, and on October 31, 1929, 18,300 shares were delivered to J. P. Morgan & Company against payment to the Company of $6,751,905.50. The total amount thus borrowed by the Petitioner for this purpose from J. P. Morgan & Company was $10,386,179.50.

(w) On November 4, 1929, 5,000 shares of this stock were sold by the Company for the Petitioner's account for $2,165,000, and on November 7, 1929, 5,000 shares were sold for $2,125,000, a total price of $4,290,000. The Petitioner reported a profit of $655,726 on said sale of 10,000 shares in his 1929 Federal income tax return. The Company, however, failed to liquidate the balance of the Petitioner's special purchase of 28,300 shares, leaving him with 18,300 shares.

(x) By reason of subsequent market declines which carried the price of National City Bank stock down to between $200 and $250 per share by the middle of December 1929, the Petitioner had
18 an enormous loss on the remaining 18,300 shares. The loss on this block of stock was in excess of the Petitioner's total income for 1929, including profits on the sales of securities during the year. The Petitioner had purchased the 28,300 shares on October 29, 1929, for a special and temporary purpose and not for permanent investment. Unless the 18,300 shares were sold, to establish the actual loss which he had sustained as a result of his purchase of said stock, his real financial gain or loss for the year 1929 would not have been accurately or properly reflected.

(y) The necessity for the sale having been determined, the Petitioner was forced to consider the method of sale in the light of then existing conditions. The stock of the National City Bank was not listed on any stock exchange, being dealt in on a market known as the "Over-the Counter" market. The market in National City Bank stock was of very small volume, averaging only a few thousand shares a day, so that the offering for sale of a block of 18,300 shares would have depressed the market seriously and would have, undoubtedly, driven the price of the stock far below $200 per share, thus causing the Petitioner a much greater loss than he actually realized by selling at $212 per share.

(z) On or about December 4, 1929, the employees of The National City Bank and affiliated companies had purchased some 50,000

shares of National City Bank stock at $200 a share, a price which the employees subscribing therefor must have considered very attractive since the issue was over-subscribed for by more than
19 100%. In view of this fact, the Petitioner was unwilling by any act of his to depress the market price below the figure at which the employees of the Bank and affiliated companies had purchased their stock.

(aa) Any offering for sale of a block of 18,300 shares on the market by the Petitioner, Chairman of The National City Bank and affiliated companies, might have cast suspicion on the institutions headed by the Petitioner and caused an unfavorable reaction.

(bb) The Petitioner's wife, who possessed an independent fortune of her own, was desirous of acquiring stock of The National City Bank. In view of this fact and the circumstances above mentioned, it was agreed between the Petitioner and his wife that he would sell 18,300 shares to her.

(cc) On or about December 19, 1929, the Petitioner conferred with counsel experienced in tax matters. The Petitioner disclosed to counsel all the facts in connection with the proposed sale to Mrs. Mitchell, including the fact that the stock was then pledged with J. P. Morgan & Co. as collateral for a loan to him; that he proposed to carry Mrs. Mitchell for the full amount of the purchase price in order that Mrs. Mitchell would not be forced to sacrifice any of her personal holdings during the then depressed condition of the market; that the sale was being made to enable the Petitioner to take the loss which he had actually incurred on the stock; and that he believed that Mrs. Mitchell would make a handsome profit out of her purchase.

20 (dd) Thereafter, papers were prepared by counsel to accomplish the sale and submitted to the Petitioner for execution by him and Mrs. Mitchell. The Petitioner was advised by counsel that the execution of such papers would constitute a sale by the Petitioner to Mrs. Mitchell of the 18,300 shares which would be valid and legal and would result in and establish a deductible loss for income tax purposes.

(ee) On or about December 20, 1929, the Petitioner and Mrs. Mitchell executed and delivered these papers. Both in making the said sale and in taking the loss resulting therefrom on his 1929 income tax return, the Petitioner relied upon such advice of counsel.

(ff) Said sale of 18,300 shares was an absolute and unconditional sale at or about the price then prevailing in the market for National City Bank stock and at the time of this transaction and at all other times, both the Petitioner and Mrs. Mitchell intended it to be an absolute and unconditional sale. There was no agreement between the Petitioner and Mrs. Mitchell, express or implied, whereby the Petitioner retained any rights or interest in said stock nor was there any contract or option between them for the repurchase of this stock by the Petitioner.

(gg) By reason of the subsequent and wholly unforeseen further decline in the stock market the stock could not be sold at a profit and for a period of approximately eighteen months was held by Mrs. Mitchell. During this time she received the dividends
21 paid upon the 18,300 shares, paid the interest upon the loan made to carry the stock and reported the dividends received and interest paid in her income tax returns.

(hh) In or about March 1932, the Petitioner, desiring that Mrs. Mitchell should not sustain the large loss which had developed upon the transaction, purchased the 18,300 shares from her at the price of $212 per share. This repurchase was not made pursuant to any prior agreement between the Petitioner and Mrs. Mitchell to do so, but was made because the Petitioner desired to relieve Mrs. Mitchell from the loss which she had sustained because of the decline in the market value of the stock subsequent to her purchase. The papers in connection with such repurchase were prepared by counsel after a full and complete disclosure by the Petitioner of the facts and his reasons for desiring to purchase the stock from Mrs. Mitchell. The Petitioner and Mrs. Mitchell executed the papers so prepared by counsel and relied upon counsel's advice and such papers as legally and validly effectuating the transfer of the stock from Mrs. Mitchell to the Petitioner.

The 1930 loss on 8,500 shares of Anaconda

(ii) On December 26, 1930, the Petitioner sold 8,500 shares of common stock of Anaconda Copper Mining Company to W. D. Thornton for $229,500. The cost of this stock to the Petitioner was $988,248.25. This sale resulted in a loss to the Petitioner of $758,918.25, including $170 for Federal and New York State transfer stamps, which loss was included in his 1930 income tax return.
22 (jj) The sale of this stock was made directly to W. D. Thornton by private sale because of the size of the block of stock involved, and because the Petitioner had been requested by John D. Ryan, then Chairman of the Board of Directors of the Anaconda Company and a person interested in preventing any undue disturbance in the market price of the stock, not to throw the stock upon the market, both the Petitioner and Ryan being members of the Anaconda Board of Directors. The sale in this manner had been passed upon by counsel for the Petitioner. Full payment of the stock was received by the Petitioner at the time of delivery on December 26, 1930. The price was approximately that then prevailing on the New York Stock Exchange.

(kk) Said sale of 8,500 shares of Anaconda stock was an absolute and unconditional sale at or about the price thereof then prevailing on the New York Stock Exchange and at the time of the sale on December 26, 1930, the Petitioner had no contract or option with Thornton for the repurchase by the Petitioner of the 8,500 shares

or any portion thereof, nor was there any intent that this transaction be other than an absolute and unconditional sale of the stock.

(ll) In the latter part of April or early May, 1931, John D. Ryan approached the Petitioner and stated that he would like to have the Petitioner as a director of the Anaconda Company acquire Anaconda stock to the amount of his former holdings, which he had previously sold, giving as reasons that, although the market price of the
23 stock had advanced substantially after the Petitioner's sale on December 26, 1930, the market price had gone down to about the same levels as the sale price; that in his opinion Anaconda stock at the then market price was low; and that the Petitioner should be able to profit by such a purchase. The Petitioner reluctantly acquiesced in Ryan's insistence that he make the purchase and only after Ryan had assured him that the purchase of such a sizeable block of stock would not raise the market price, Ryan stating that he could provide stock to meet the order, and after Ryan had undertaken to give the Petitioner financial assistance. In addition, Ryan undertook to handle the transaction for the Petitioner, advising the Petitioner to put in an order for the stock at the brokerage firm of Hornblower & Weeks, New York City, which the Petitioner did on or about May 4, 1931.

(mm) On or about May 5, 1931, the Petitioner was notified that Hornblower & Weeks had purchased for his account 8,500 shares of Anaconda stock at 26⅝, or a total purchase price, including brokerage commissions and interest, of $227,628.60, a purchase which was made through the New York Stock Exchange.

(nn) Some time thereafter, the Petitioner was advised by Ryan that he (Ryan) had secured the 8,500 shares of Anaconda stock to meet the Petitioner's purchase order from W. D. Thornton. Until so advised by Ryan, the Petitioner had no knowledge that the 8,500 shares of Anaconda stock purchased through Hornblower & Weeks were purchased at the same time that W. D. Thornton put
24 up 8,500 shares of Anaconda stock for sale. The Petitioner had no negotiations with Thornton for the purchase of said block of stock, nor did he request Ryan to conduct any. The Petitioner had no intent to acquire any Anaconda stock after the sale on December 26, 1930, until he was approached by Ryan and earnestly urged by him to do so as aforesaid and the purchase of the 8,500 shares on or about May 4, 1931, was not pursuant to any contract or option between the Petitioner and Thornton and/or Ryan.

United States of America v. Charles E. Mitchell

(oo) In order to recover any portion of the alleged deficiency of $1,275,644.42, the Respondent must establish that the failure to report the sum of $666,666.67, for the year 1929, or the deduction of the losses arising out of the sale of the 18,300 shares of National City Bank stock in 1929, and out of the sale of 8,500 shares of Anaconda stock in 1930, was false or fraudulent with intent to evade tax.

(pp) These identical issues have been fully raised and tried in the action of United States of America v. Charles E. Mitchell, wherein the Petitioner was indicted for and charged with fraudulently attempting to evade and defeat income taxes upon his income for the years 1929 and 1930, by filing false income tax returns with intent to evade tax. The Petitioner was tried in the United States District Court for the Southern District of New York before a jury upon the issues of whether the failure to include as an item of income the sum of $666,666.67, and the taking of the losses
25 resulting from the sale of the 18,300 shares of National City Bank stock in 1929, and 8,500 shares of Anaconda stock in 1930, were false or fraudulent and done with intent to evade tax.

(qq) After a trial which lasted six weeks, in which the United States offered most detailed proof, the Petitioner was acquitted of every charge made against him.

(rr) Thus, upon the indictment and the Judge's charge and all the issues therein raised, such acquittal constitutes a final adjudication in the Petitioner's favor of the very issues before this Board and the Respondent is forever barred from assessing or collecting any tax based upon charges of fraud or intent to evade tax on the part of the Petitioner for the calendar years 1929 and 1930.

(ss) The Petitioner has already been subjected to a trial for fraud under a statute which imposed a penalty in the event that the Petitioner had been convicted. The Petitioner cannot be again tried upon the same charges where another penalty is imposed by statute. Since this proceeding cannot be maintained against the Petitioner unless fraud with intent to evade tax is established, the Petitioner in this proceeding is being subjected to a second action, penal in nature, contrary to the law and the Petitioner's rights thereunder.

(tt) The assessment and/or collection of the sum of $1,275,644.52, or any part thereof, constitutes a violation of the Petitioner's
26 constitutional rights in that it subjects him to double jeopardy and amounts to a deprivation of his property without due process of law.

Wherefore, the Petitioner prays that this Board may hear the proceeding and

(1) Determine that the Petitioner did not have a taxable net income in the amount of $3,466,324.02, or in any other amount, for the calendar year 1929;

(2) Determine that the Petitioner had a deductible loss in the amount of $2,872,305.50 for the calendar year 1929 upon the sale of 18,300 shares of stock of The National City Bank;

(3) Determine that the amount of $666,666.67, received by the Petitioner from The National City Company on or about July 1, 1929, did not constitute taxable income to the Petitioner for the calendar year 1929;

(4) Determine that the Petitioner did not file a false and fraudulent return with intent to evade tax for the calendar year 1929;

(5) Determine that the Petitioner did not have a taxable net income of $624,637.89, in the calendar year 1930, or in any other amount in excess of $8,552.40, the amount of net income reported in the Petitioner's return for said year;

(6) Determine that the Petitioner had a deductible loss of $758,918.25, upon the sale of 8,500 shares of the capital stock of Anaconda Copper Mining Company during the calendar year 1930;

27 (7) Determine that the Petitioner did not file a false and fraudulent return with intent to evade tax for the calendar year 1930;

(8) Determine that no part of the alleged deficiency of $1,275,644.52, for the calendar years 1929 and 1930, is due to fraud with intent to evade tax;

(9) Determine that the assessment and collection of said amount of $1,275,644.52, or any part thereof, have been barred by the Statute of Limitations under Section 275 of the Revenue Act of 1928;

(10) Determine that the issues as to whether the Petitioner filed a false or fraudulent return with intent to evade tax for said calendar years 1929 and 1930, and as to whether any part of said alleged deficiency of $1,275,644.52, was due to fraud with intent to evade tax, were the issues in the criminal action entitled "United States of America v. Charles E. Mitchell" tried in the United States District Court for the Southern District of New York, and that the conclusion of said action in the Petitioner's favor constitutes a full and final adjudication of any issues of fraud with intent to evade tax so as to bar the assessment and collection of said alleged deficiency of $1,275,644.52, or any part thereof, by the Respondent;

(11) Determine that this proceeding, or any other proceeding, by the Respondent to assess or collect any tax and/or penalty from the Petitioner for the calendar years 1929 and 1930, sub-

28 jects the Petitioner to double jeopardy and amounts to a deprivation of the Petitioner's property without due process of law;

(12) Determine that there is no deficiency due from the Petitioner for the calendar years 1929 and 1930, or either of them; and

(13) Grant such other and further relief to the Petitioner as may be just and equitable in the premises.

WILLIAM WALLACE,
Counsel for Petitioner,
No. 25 Broadway, New York, N. Y.

[*Duly sworn to by Charles E. Mitchell; jurat omitted in printing.*]

29 *Exhibit A to petition*

[Copy]

TREASURY DEPARTMENT,
Washington, Dec. 8, 1933.

Office of Commissioner of Internal Revenue

Mr. CHARLES E. MITCHELL,
% Mr. LEONARD C. MOORE,
25 Broadway, New York, New York.

SIR: You are advised that the determination of your income tax liability for the years 1929 and 1930 discloses a deficiency of $1,275,644.52, tax and penalty, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

However, if you do not desire to petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and pre-
30 venting the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier; Whereas if this form is not filed, interest at the rate of 6% per annum will accumulate.

Respectfully,

GUY T. HELVERING,
Commissioner.
By CHAS. J. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

Statement

IT:E:Aj.
RJC-21414-60D.
In re: CHARLES E. MITCHELL,
% Mr. LEONARD C. MOORE,
25 Broadway, New York, New York.

Year	Tax assessable	Tax assessed	Deficiency in tax	50% penalty
1929	$728,709.84	None	$728,709.84	$364,354.92
1930	121,719.84	None	121,719.84	60,859.92
Totals	850,429.68	None	850,429.68	425,214.84

Total deficiency, tax, and penalty $1,275,644.52

31 1929

Net loss reported on return		$(48,809.65)
Additions to income:		
(1) Additional compensation	$666,666.67	
(2) Loss on security sales disallowed	2,875,973.90	
		3,542,640.57
Total		$3,493,740.92
Deduction from income:		
(3) Dividends received reduced		27,416.90
Net income corrected		$3,466,324.02

Explanation of Adjustments

(1) The amount of $666,666.67, received by you from the National City Company on July 1, 1929, as your share in the Management fund, constitutes taxable income.

(2) Loss on security sales disallowed consists of the following:

Sale of 18,300 shares of National City Bank stock to Mrs. Mitchell, loss claimed disallowed	$2,872,305.50
Other losses disallowed	3,668.40
Total loss on sales disallowed	$2,875,973.90

(3) Dividends received have been reduced as follows:

Reported on return	$262,874.40
Correct amount received	235,457.50
Reduction in income	$27,416.90

32 Computation of Tax

Net income corrected		$3,466,324.02
Less:		
Capital net gain		734,296.16
Income subject to surtax		$2,732,027.86
Less:		
Dividends	$235,457.50	
Interest on Liberty Bonds	4,789.12	
Personal exemption	3,500.00	
Credit for dependents	800.00	
		244,546.62
Income subject to normal tax		$2,487,481.24
Tax at ½% on $4,000.00		$20.00
Tax at 2 on $4,000.00		80.00
Tax at 4% on $2,479,481.24		99,179.25
Surtax on $2,732,027.86		538,065.57
Tax at 12½% on capital net gain		91,787.02
Total		$729,131.84
Less Earned Income Credit:		
Earned net income limited to	$30,000.00	
Less: Exemption and credit	4,300.00	
Amount for normal tax	$25,700.00	
Tax at ½% on $4,000.00	$20.00	
Tax at 2% on $4,000.00	80.00	
Tax at 4% on $17,700.00	706.00	
Surtax on $30,000.00	880.00	
Total tax, earned income	$1,688.00	
33 Credit of 25 %		422.00
Total tax assessable		$728,709.84
Tax assessed		None
Deficiency in tax		$728,709.84
50 percent penalty as provided by section 293 (b) of the Revenue Act of 1928		$264,354.92

1930

Net income reported on return		$8,552.40
Additions to income:		
(1) Loss on security sale disallowed	$758,918.25	
(2) Dividends received increased	22,665.00	
		781,583.25
Total		$790,135.65
Deductions from income:		
(3) Interest received reduced	$158,417.01	
(4) Contributions increased	7,080.75	
		165,497.76
Net income corrected		$624,637.89

Explanation of Adjustments

(1) Loss of $758,918.25 claimed on sale of 8,500 shares of Anaconda Mining Company is disallowed for the reason that it is held that the sale to Mr. William D. Thornton on December 26, 1930, did not result in a deductible loss.

34 (2) Dividends received on the stock of domestic corporations have been increased as follows:

Dividends received, 1930	$297,220.37
Reported on return	274,555.37
Income increased	$22,665.00

(3) Interest received from Mrs. Mitchell during 1930 in the amount of $158,417.01, on the principal of $3,879,600.00, has been eliminated from taxable income.

(4) Due to the amount of net income now shown for 1930, contributions made are allowable in full, as follows:

Contributions	$8,590.00
Deducted on return	1,509.25
Additional allowance	$7,080.75

Computation of Tax

Net income corrected		$624,637.89
Less:		
Capital net gain		79,738.93
Income subject to surtax		$544,898.96
Less:		
Domestic dividends	$297,220.37	
Personal exemption	3,500.00	
Credit for dependents	800.00	
		301,520.37
Income subject to normal tax		$243,378.59
35 Tax at 1½% on $4,000.00		$60.00
Tax at 3% on $4,000.00		120.00
Tax at 5% on $235,378.59		11,768.93
Surtax on $544,898.96		100,639.79
Tax at 12½% on capital net gain		9,967.37
Total		$122,556.09

Less Earned income credit:		
Earned net income limited to	$30,000.00	
Less Exemption and credit	4,300.00	
Amount for normal tax	$25,700.00	
Tax at 1½% on $4,000.00	$60.00	
Tax at 3% on $4,000.00	120.00	
Tax at 5% on $17,700.00	885.00	
Surtax on $30,000	880.00	
Total tax on earned income	$1,945.00	
Credit of 25%	$486.25	
Income tax paid at source	350.00	
		836.25
Total tax assessable		$121,719.84
Tax assessed		None
Deficiency in tax		$121,719.84
50% penalty as provided by section 293(b), Revenue Act of 1928		$60,859.92

Payment should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

36 Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed March 8, 1934

The Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits, denies and alleges as follows:

(1) and (2) Admits the allegations contained in paragraphs (1) and (2) of the petition.

(3) Admits that the amounts in controversy are income taxes and penalties for the calendar years 1929 and 1930, but denies all other allegations contained in paragraph (3) of the petition.

(4) (a) to (j) inc. Denies that the respondent committed error as alleged in subparagraphs (a) to (j) inclusive, of paragraph (4) of the petition.

(5) (a) Admits that petitioner filed an income tax return for
37 the calendar year 1929 on March 15, 1930, and filed an income tax return for the calendar year 1930, on March 14, 1931, and that the sixty day deficiency letter was mailed to petitioner on December 8, 1933, more than two years after either of said income tax returns was filed, as alleged in subparagraph (a) of paragraph (5) of the petition, but denies that, at the time of the mailing of the sixty day deficiency letter, the assessment and/or collection of income taxes for either of said years was barred by the statute of limitations under the provisions of Section 275 of the Revenue Act

of 1928. Denies all other allegations contained in subparagraph (a) of paragraph (5) of the petition.

(5) (b) to (d) inc. Denies the allegations contained in subparagraphs (b) to (d), inclusive, of paragraph (5) of the petition.

(5) (e) Admits that the petitioner received during the year 1929, as his distributive share of the Management Fund of National City Company the sum of $666,666.67, but denies all other allegations contained in said subparagraph (e) of paragraph (5) of the petition.

(5) (f) to (m) inc. Denies the allegations contained in subparagraphs (f) to (m), inclusive, of paragraph (5) of the petition.

(5) (a) Admits that the petitioner did not include, in his Federal income tax return for the calendar year 1929, the distribution which he received during that year from the Management Fund of National City Company in the amount of $666,666.67, but denies
38 all other allegations contained in subparagraph (a) of paragraph (5) of the petition.

(5) (o) to (r) inc. Denies the allegations contained in subparagraphs (o) to (r), inclusive, of paragraph (5) of the petition.

(5) (s) For lack of information sufficient to form a belief as to their truth or falsity, denies the allegations contained in subparagraph (s) of paragraph (5) of the petition.

(5) (t) to (dd) inc. Denies the allegations contained in subparagraph (t) to (dd), inclusive, of paragraph (5) of the petition.

(5) (ee) Admits that, in his Federal income tax return for 1929, the petitioner claimed a deduction for an alleged loss on the sale of 18,300 shares of National City Bank stock, but denies all other allegations contained in subparagraph (ee) of paragraph (5) of the petition.

(5) (ff) to (hh) inc. Denies the allegations contained in subparagraphs (ff) to (hh), inclusive, of paragraph (5) of the petition.

(5) (ii) Admits that, in his 1930 Federal income tax return, the petitioner claimed a deduction for an alleged loss on the sale of 8,500 shares of common stock of Anaconda Copper Mining Company, but denies all other allegations contained in subparagraph (ii) of paragraph (5) of the petition.

(5) (jj) to (tt) inc. Denies the allegations contained in subparagraphs (jj) to (tt), inclusive, of paragraph (5) of the petition.

(6) Denies generally and specifically each and every allega-
39 tion contained in the petition, not hereinbefore expressly admitted, qualified, or denied.

(7) Respondent alleges that petitioner filed a false and fraudulent income tax return for each of the calendar years 1929 and 1930, with intent to evade tax, and that part of the deficiency found for each of said years was due to fraud with intent to evade tax.

(8) Respondent alleges and relies upon the following facts:

(a) On March 15, 1930, the petitioner filed with the United States Collector of Internal Revenue for the Third District of New York his Federal income tax return for the calendar year 1929. Said return showed a net loss of $48,899.65, whereas his correct net in-

come was $3,466,324.02, thereby understating his net income for said calendar year 1929 in the amount of $3,515,223.67, which said understatement was wilfully and fraudulently made with intent to evade tax.

(b) In computing his net income as reported in his Federal income tax return for the calendar year 1929, the petitioner wilfully and fraudulently and with intent to evade tax neglected and failed to report income subject to tax in the sum of $666,666.67, which he received on or about July 1, 1929, as additional compensation from the National City Company.

(c) In his Federal income tax return for the calendar year 1929, the petitioner reported the receipt of salaries, wages, com-
40 missions, etc. from National City Company in the amount of $510,629.28, whereas he received during said calendar year 1929 from said National City Company salaries, wages, commissions, etc., in the amount of $1,177,295.95, thereby understating his income from said source in the amount of $666,666.67, which said understatement of income was wilfully and fraudulently made with intent to evade tax.

(d) In computing his net income as reported in his Federal income tax return for the calendar year 1929, the petitioner wilfully and fraudulently and with intent to evade tax deducted as an alleged loss the amount of $2,872,305.50, claiming to have suffered a loss of said amount upon the alleged sale to his wife, Elizabeth R. Mitchell, of 18,300 shares of stock of National City Bank, whereas no such sale was made by petitioner as alleged and no such loss of $2,872,305.50, as alleged or of any other amount was sustained by petitioner upon such alleged sale.

(e) In his Federal income tax return for the calendar year 1929, the petitioner reported a loss from the sale of real estate, stocks, bonds, etc. in the amount of $1,484,067.53, whereas he received from the sale of real estate, stocks, bonds, etc., a profit of $1,388,237.97, thereby understating his income from said sources in the amount of $2,872,305.50, which said understatement of income was wilfully and fraudulently made with intent to evade tax.

(f) On March 14, 1931, the petitioner filed with the United States Collector of Internal Revenue for the Third District of New
41 York his Federal income tax return for the calendar year 1930. Said return showed a net income of $8,552.40, whereas his correct net income for said calendar year 1930 was $624,637.89, thereby understating his net income for said calendar year 1930, in the amount of $616,085.49, which said understatement of income was wilfully and fraudulently made with intent to evade tax.

(g) In computing his net income as reported in his Federal income tax return for the calendar year 1930, the petitioner wilfully and fraudulently and with intent to evade tax deducted as a loss the amount of $758,918.25, claiming to have suffered an alleged loss of said amount upon the sale to W. D. Thornton of 8,500 shares of common stock of Anaconda Copper Mining Company, whereas no

such sale was made by petitioner as alleged, and no such loss of $758,918.25, as alleged or of any other amount was sustained by petitioner upon such alleged sale.

(h) In his Federal income tax return for the calendar year 1930, the petitioner reported a loss from the sale of real estate, stocks, bonds, etc., in the amount of $683,318.42, whereas he received from the sale of real estate, stocks, bonds, etc., a profit of $75,599.83, thereby understating his net income from said source in the amount of $758,918.25, which said understatement of income was wilfully and fraudulently made with intent to evade tax.

(i) In computing his net income as reported in his Federal
42 income tax return, for the calendar year 1930, the petitioner wilfully and fraudulently and with intent to evade tax, neglected and failed to report income subject to tax in the sum of $54,900, which sum was received by him during the calendar year 1930, as dividends on 18,300 shares of stock of the National City Bank.

(j) In his Federal income tax return for the calendar year 1930, petitioner reported as dividends on stock of domestic corporations, the sum of $274,555.37, whereas during said calendar year 1930 he received as dividends from the stock of domestic corporations, subject to Federal taxation, the amount of $329,455.37, thereby understating his net income from said source in the amount of $54,900.00, which understatement was wilfully and fraudulently made with intent to evade tax.

(k) For further facts in this case the respondent refers to the deficiency notice and statement, a copy of which is attached to the petition, and the same is hereby adopted in this answer as fully as if incorporated herein.

(9) Respondent further alleges that the Federal income tax return of petitioner for each of the calendar years 1929 and 1930 was false and fraudulent and made with intent to evade tax, and that, under the provisions of Section 276 of the Revenue Act of 1928, there is no statute of limitations applicable to the assessment or collection of the tax due from petitioner for either of said years.

Wherefore, it is prayed that the appeal be denied, and that
43 the taxes and penalties as shown in the deficiency notice be in all respects approved.

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
EDWARD S. GREENBAUM,
THOMAS E. DEWEY,
NATHAN GAMMON,
JAMES D. HEAD.

Before United States Board of Tax Appeals

Minutes of Proceedings, August 6, 1934

Date, August 6, 1934.
Place, Washington, D. C.
Docket No. 74720.
Proceeding: Charles E. Mitchell.
Assigned to: Mr. Adams—Mr. Van Fossan.
Division No. 12–9.
Counsel for Petitioner: William Wallace, Esq., 25 Broadway, New York, N. Y.
Counsel for Respondent: N. Gammon, Esq., J. D. Head, Esq.
Stenographic Reporter: Lowe.
Hearing: (Hour commenced and closed) 10:30, 12:15.
Sub. C. A. V.
Transcript Ordered (Yes or No), yes.
On the merits ----------
44 On motion of Petitioner to amend to conform to proof (Respondent objects).
Ordered: Granted (Granted).
Filed at hearing: Petitioner's brief.
Petitioner's brief: Pet. Reply to be filed later.
Respondent's brief: ----------
Witnesses for Petitioner

Witnesses for Respondent

Exhibits

Petitioner's (Number and describe).
Respondent's (Letter and describe).

(Signed) JAMES W. KIDWELL, JR.,
Division Clerk.

Form 431.

45 Before United States Board of Tax Appeals

[Title omitted.]

Reply to answer

Filed Aug. 8, 1934

The above named petitioner, by his attorney, William Wallace, for reply to the answer filed by the above named respondent admits, denies, and alleges as follows:

(7) Denies the allegations contained in paragraph (7) of the answer.

(8) (a) Admits that on March 15, 1930, petitioner filed with the United States Collector of Internal Revenue for the Third District of New York his Federal Income tax return for the calendar year 1929, and admits that said return showed a net loss of $48,899.65. Denies that petitioner's correct net income for said year was $3,466,324.02, or any sum other than as stated in his return for said year, and denies that there was any understatement either wilfully or fraudulently with intent to evade tax or otherwise of his net income for said year in said return.

46 (8) (b) Admits that, in computing his net income as reported in his Federal Income tax return for the calendar year 1929, petitioner did not report therein as income subject to tax the sum of $666,666.67, which he had received on or about July 1, 1929, from The National City Company. Denies that his act of not reporting said sum in said return was either wilful or fraudulent with intent to evade tax, and denies that the said sum of $666,666.67, or any part thereof, was compensation other than an advance on account under the provisions of a profit-sharing plan, or otherwise than as alleged in subparagraphs (b) to (n), inclusive, of paragraph (5) of the petition heretofore filed herein.

(8) (c) Admits that petitioner in his Federal Income tax return for the calendar year 1929, reported the receipt of salaries, wages, and commissions from The National City Company in the amount of $510,629.28. Denies that he received from said company during said calendar year salaries, wages, commissions, etc., in the amount of $1,177,295.95, or in any other amount than $510,629.28, and denies that he understated his income from salaries, wages, commissions, etc., in any amount whatever either wilfully or fradulently with intent to evade tax or otherwise.

(8) (d) Admits that in computing his net income as reported in his Federal Income tax return for the calendar year 1929, petitioner deducted as a loss the amount of $2,872,305.50, and that he claimed to have suffered the loss of said amount upon the sale by him

47 to his wife, Elizabeth R. Mitchell, of 18,300 shares of stock of The National City Bank. Denies that no such sale was made by petitioner; denies that said loss of $2,872,305.50, was not sustained by petitioner upon such sale; denies that said loss deduc-

tion of $2,872,30'.50 was made by him either wilfully or fraudulently with intent to evade tax; and denies that the said loss deduction of $2,872,305.50, was claimed or made by him either wilfully or fraudulently with intent to evade tax.

(8) (e) Admits that in his Federal income tax return for the calendar year 1929 petitioner reported the loss from the sale of real estate, stocks, bonds, etc., in the amount of $1,484,067.53. Denies that petitioner received from the sale of real estate, stocks, bonds, etc., a profit of $1,388,237.97, or any other sum, and denies that in his said income tax return for the calendar year 1929, petitioner either wilfully or fraudulently with intent to evade tax or otherwise understated his income from the sale of real estate, stocks, bonds, etc., in the amount of $2,872,305.50, or any other amount whatever.

(8) (f) Admits that on March 14, 1931, petitioner filed with the United States Collector of Internal Revenue for the Third District of New York, his Federal Income tax return for the calendar year 1930, and admits that said return showed a net income of $8,552.40. Denies that petitioner's correct net income for said calendar year was $624,637.89, or any other sum than $8,552.40. Denies that petitioner either wilfully or fraudulently with intent to evade tax
48 or otherwise, understated his net income for the calendar year 1930, in the amount of $616,085.49, or in any other amount.

(8) (g) Admits that, in computing his net income as reported in his Federal Income tax return for the calendar year 1930, petitioner deducted as a loss the amount of $758,918.25, and that he claimed to have suffered said loss upon the sale to W. D. Thornton of 8,500 shares of common stock of Anaconda Copper Mining Company. Denies that no such sale was made by petitioner to said Thornton, and denies that no such loss of $758,918.25 was sustained upon the said sale or that the loss sustained thereon was any different from or other than $758,918.25.

(8) (h) Admits that in his Federal Income tax return for the calendar year 1930, petitioner reported the loss from the sale of real estate, stocks, bonds, etc., in the amount of $683,318.42. Denies that petitioner received from the sale of real estate, stocks, bonds, etc., during the said year a profit of $75,599.83, or any other amount of profit whatever, and denies that petitioner in his said return for the calendar year 1930 either wilfully or fraudulently with intent to evade tax or otherwise, understated his net income from the sale of real estate, stocks, bonds, etc., in the amount of $758,918.25, or in any other amount whatever.

(8) (i) Admits that in computing his net income as reported in his Federal Income tax return for the calendar year 1930, petitioner did not report income subject to tax in the sum of $54,900, as dividends on 18,300 shares of stock of The National City Bank. Denies that said sum of $54,900, or any part thereof, was re-
49 ceived by him during the said calendar year as dividends on 18,300 shares of stock of The National City Bank, and denies that the act of petitioner in not reporting the said dividends was either wilfully or fraudulently done with intent to evade tax.

(8)(j) Admits that in his Federal Income tax return for the calendar year 1930, petitioner reported as dividends on stock of domestic corporations the sum of $274,555.37. Denies that during said calendar year 1930 petitioner received as dividends from the stock of domestic corporations, subject to Federal taxation, the amount of $329,455.37, or any other or greater sum than $274,555.37, and denies that in so reporting the said sum of $274,555.37 as dividends on the stock of domestic corporations, petitioner either wilfully or fraudulently with intent to evade tax, or otherwise, understated his net income from said source in the amount of $54,900, or in any other amount whatever.

(8)(k) Admits that a copy of the deficiency notice and statement referred to in subparagraph (k) of paragraph (8) of said answer is attached to the petition herein.

(9) Denies that the Federal Income tax return of this petitioner for either the calendar year 1929 or the calendar year 1930 was false or fraudulent or made with intent to evade tax, and denies that, because of Section 276 of the Revenue Act of 1928, there is no Statute of Limitations applicable to the assessment or collection of the tax due from petitioner for either of said years.

50 (10) Petitioner denies generally and specifically each and every allegation contained in paragraphs (7), (8) (a) to (8) (k), inclusive, and in paragraph (9) of the answer not expressly admitted, qualified, or denied herein.

Wherefore, petitioner prays that the relief requested in the petition be granted.

WILLIAM WALLACE,
Counsel for Petitioner,
Office and P. O. Address, No. 25 Broadway,
Borough of Manhattan, City of New York.

[*Duly sworn to by Charles E. Mitchell; jurat omitted in printing.*]

51 Before United States Board of Tax Appeals

[Title omitted.]

Stipulation of facts

Filed May 23, 1934

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys of record that, for the purpose of this proceeding only, the following facts shall be taken as true, and that the exhibits referred to herein and submitted herewith are hereby made a part of this stipulation as fully and with the same force and effect as if each exhibit were specifically incorporated in this stipulation, provided, however, that the right is reserved to either party to object to the relevancy or materiality of any facts stated herein or any exhibit submitted herewith, which objections may be interposed and urged upon the hearing; and

It is further stipulated and agreed that this stipulation shall be without prejudice to the right of either party to introduce further testimony at the trial of the cause, subject to all proper objections to the admissibility in evidence of testimony so offered.

52 1. On March 15, 1930, petitioner filed his federal income tax return for the calendar year 1929 (Exhibit A).

2. On March 14, 1931, petitioner filed his federal income tax return for the calendar year 1930 (Exhibit B).

3. The closing bid and asked prices of National City Bank stock on the New York over-the-counter market were as stated in Exhibit 51 on the dates referred to therein.

4. On October 28, 1929, The National City Company purchased 71,469 shares of National City Bank stock at a total cost of approximately $32,000,000. The purchases on October 28, 1929, increased the City Company's holdings of National City Bank stock from 12,202 shares to 83,671 shares. These purchases were made through and carried in an account on The National City Company's books known as the "Sole Account."

5. On the morning of October 29, 1929, petitioner arranged with J. P. Morgan & Company for a loan up to $12,000,000, to be secured by National City Bank stock as collateral, at not more than $200 per share. On October 30, 1929, petitioner confirmed by letter his understanding as to the $12,000,000 J. P. Morgan & Company credit (Exhibit C).

6. On October 30, 1929, petitioner delivered to J. P. Morgan & Company as part of the collateral to secure the proposed

53 loan, 30,000 shares of National City Bank stock personally owned outright by him, standing in his name and endorsed in blank.

7. The stock last above referred to had all cost petitioner less than $200 per share.

8. At the time petitioner arranged for said loan, he had no indebtedness to J. P. Morgan & Company, all his previous borrowings from J. P. Morgan & Company having been paid off (Exhibit NNN).

9. On October 29, 1929, a special account was opened on the books of The National City Company for shares of National City Bank stock purchased for petitioner's account, and on that day an aggregate of 28,306 shares of National City Bank stock was purchased and placed in that account. The average cost of 28,300 shares of this stock, hereinafter referred to, was $367.0028 per share, totaling $10,386,179.50.

10. Said 28,300 shares were registered in the name of Taff & Company, a nominee of The National City Company, used for the purpose, among other things, of acting as a nominee or registered owner of securities, in the place of the owners thereof. As such nominee, Taff & Company received and disbursed dividends for the accounts of the true owners.

11. Pursuant to petitioner's instructions, said 28,300 shares of National City Bank stock were delivered to J. P. Morgan & Company. On October 30, 1929, 10,000 shares were delivered to
54 J. P. Morgan & Co., who paid to The National City Company $3,634,274, the cost of said 10,000 shares. On October 31, 1929, the remaining 18,300 shares of National City Bank stock were delivered to J. P. Morgan & Company, who paid to The National City Company $6,751,905.50, the cost of said 18,300 shares. The total of 28,300 shares of stock so delivered to J. P. Morgan & Company was placed in the petitioner's account, which was charged with $10,386,179.50, the amount paid out against such stock.

12. Pursuant to petitioner's instructions, J. P. Morgan & Company delivered to The National City Company from the 28,300 shares above referred to, in petitioner's loan account, 4,000 shares of National City Bank stock at $435 per share and 1,000 shares at $425 per share, both on November 4, 1929, and 5,000 shares at $425 per share on November 6, 1929, and received checks of The National City Company aggregating $4,290,000 in payment thereof, which sum was credited by J. P. Morgan & Company against petitioner's loan account. The National City Company had sold the said 10,000 shares for petitioner's account at the prices above mentioned on or before November 4, 1929, and had received payment therefor.

13. As a result of the aforesaid credit, there was a balance due from petitioner to J. P. Morgan & Company on November 7, 1929, of $6,096,179.50 as collateral for which J. P. Morgan & Company held the aforesaid 30,000 shares of National City Bank stock registered in the name of petitioner and the remaining 18,300
55 shares of said National City Bank stock registered in the name of Taff & Company. J. P. Morgan & Company continued to hold all of said stock as collateral for petitioner's loan at all times hereinafter referred to.

14. Petitioner realized a profit of $655,726 from the sale of the said 10,000 shares of the 28,300 shares of National City Bank stock. This profit was reported on petitioner's 1929 federal income tax return.

15. Under date of October 1, 1929, The National City Bank and Corn Exchange Bank Trust Company, pursuant to the action of the directors of both banks, entered into an agreement of consolidation, subject, however, to ratification by the shareholders of both banks at meetings to be held on November 7, 1929. The agreement of consolidation provided for the exchange of 4 shares of National City Bank stock for 5 shares of Corn Exchange Bank stock. As part of the agreement, The National City Company agreed to purchase, at $360. per share in cash, any shares of Corn Exchange Bank stock which might be tendered it for purchase within twenty days after the date of consolidation. The effect of the agreement to purchase Corn Exchange Bank stock at $360. per share was to place an equivalent price on National City Bank stock of $450. per share.

On November 7, 1929, the stockholders of said banks did not ratify said consolidation and said consolidation did not take place.

16. Prior to December 20, 1929, petitioner had realized profits from the sales of securities during the year 1929 of $1,388,-
56 237.97, which amount included the profit of $655,726. realized on the sale of the total of 10,000 shares of the 28,300 shares of National City Bank stock described in ¶14. In addition to these profits from the sales of securities, petitioner received during the year 1929 from the National City Bank and The National City Company salaries and payments from management funds, in the sum of $1,206,195.02, exclusive of the sum of $666,666.67, hereafter referred to, received on or about July 1, 1929, from the management fund of The National City Company.

17. On December 20, 1929, petitioner's wife, Elizabeth R. Mitchell, had total assets consisting of the following, and having a then market value as follows:

Bonds	$260,336.19
Stocks	577,630.13
Garage[1]	21,000.00
Cash in banks	32,027.80
Mortgage participations[1]	50,000.00
Total	940,994.12

[1] The cost of the garage and the par value of the mortgage participations are as stated above. The market value is unknown.

exclusive of jewelry, furniture, objects of art, books, and the cash value of life insurance policies on the life of the petitioner.

18. From 1918 up to and including February 20, 1930, Mrs. Mitchell's investments were handled by Mr. E. F. Barrett
57 under the direction of petitioner. During that period Mrs. Mitchell's securities were in the custody of the Customers' Securities Department of The National City Company.

19. In 1918, Mr. Barrett entered petitioner's employ as his private secretary. From that position he became, successively, Assistant Secretary of The National City Company, President of The National City Realty Corporation, Assistant Cashier of The National City Bank, Assistant Vice-President of The National City Bank, and, finally, in 1926, a Vice-President of the National City Bank.

20. Mr. Barrett kept detailed records of Mrs. Mitchell's investment account from 1918 up to February 1930. Mrs. Kline, Mr. Barrett's secretary, assisted Mr. Barrett in keeping records of Mrs. Mitchell's accounts. All entries in these accounts were made either by Mr. Barrett or by his secretary, Mrs. Kline. Mrs. Mitchell's Cash Books and Ledger are Exhibits D, E, and F iden. respectively.

21. From 1918 to 1930 there were certain transactions between petitioner and Mrs. Mitchell. These were recorded in Mrs. Mitchell's books of account as follows:

(a) In November 1919 Mrs. Mitchell loaned to petitioner $23,-903.80. This loan was repaid by the petitioner on December 31, 1919.

(b) On May 14, 1920, Mrs. Mitchell loaned to petitioner
58 $125,000 par value of bonds which were returned to her by petitioner on December 23, 1920 (Exhibit 2).

(c) On October 27, 1920, Mrs. Mitchell purchased 35 shares of National City Bank stock from petitioner and gave petitioner her check covering the purchase price of these shares.

(d) From 1918 to March 1922 petitioner carried a loan or so-called "Special Account" with Mrs. Mitchell, paying her interest of 3% on moneys loaned to him. This loan was paid off on March 3, 1922, by petitioner. At that time petitioner sold to Mrs. Mitchell securities having a market value of $12,524.60. Mrs. Mitchell paid for these securities by offsetting petitioner's indebtedness to her of $11,899.34, and giving to petitioner her check for the balance of $625.26.

(e) On February 11, 1926, Mrs. Mitchell received $2,034.51 from petitioner representing the amount due her from petitioner in connection with the stock readjustment of International Telephone & Telegraph Company.

(f) On August 30, 1926, Mrs. Mitchell sold to petitioner 250 International Telephone & Telegraph rights for $2,212.50. This amount was received by Mrs. Mitchell and deposited in her bank account at the National City Bank.

(g) On October 31, 1929, Mrs. Mitchell sold to petitioner 500 International Telephone & Telegraph rights for $3,250.

59 22. On the evening of December 20, 1929, the petitioner signed a letter addressed to Mrs. Mitchell (Exhibit G) and she signed a letter to petitioner (Exhibit H). Exhibit G and a copy of Exhibit H were thereafter delivered by petitioner to E. F. Barrett. Petitioner also executed and delivered to Taff & Company a letter dated December 20, 1929 (Exhibit I).

23. At that time no internal revenue or state transfer tax stamps were attached to any of the letters described in the preceding paragraph, and there was no bill of sale executed in connection with said transaction of December 20, 1929. Subsequently, on or about the 11th day of August, 1933, on demand by the Collector of Internal Revenue, petitioner purchased internal revenue stamps in the amount of $116.46, which were affixed on the 11th day of August 1933 to Exhibit G.

24. J. P. Morgan & Company was not notified or advised of the transaction of December 20, 1929, and copies of the letters (Exhibits G and H) were not shown to J. P. Morgan & Company, or any representative of that firm. In or about the month of January 1931, J. P. Morgan & Company received for the first time knowledge or information to the effect that petitioner had or claimed to have sold said 18,300 shares of National City Bank stock.

25. Mrs. Mitchell's ledger (Exhibit F iden.) contains an entry on page 116 entitled "National City Bank Stocks," reading as follows: "1929—Dec. 20—Bought at 212—18,300 shares—cost

60 $879,600." This figure was computed by Mrs. Kline from the copies of letters (Exhibits G and H) delivered to her by Barrett for filing. In Mrs. Kline's handwriting appear, in pencil, the words "See file on securities." No other entries of any kind appear in Mrs. Mitchell's books concerning this transaction.

26. On November 18, 1929, the employees of The National City Bank and affiliated companies addressed a communication to Nathan C. Lenfesty, Cashier of National City Bank (Exhibit I). On December 4, 1929, a stock purchase plan was put forth by its directors whereby National City Bank stock was offered to employees at the price of $200 per share.

27. On or about December 20, 1929, 50,000 shares of National City Bank stock were allotted to that plan, and over 100,000 shares were applied for, so that each employee received less than 50% of the stock applied for and thereafter 10,000 additional shares were allotted to officers of The National City Bank and affiliated companies at the price of $220 per share. This offering was also oversubscribed.

28. On or about February 18, 1930, Mrs. Mitchell's custodian account at The National City Company was transferred to the City Bank Farmers Trust Company, which assumed the management of this account. The City Bank Farmers Trust Company gave to Mr. Barrett a receipt dated February 18, 1930, for the securities transferred.

29. On or about February 18, 1930, petitioner in his office
61 handed to Lindsay Bradford, Vice-President of City Bank Farmers Trust Company, the original letter from petitioner to Mrs. Mitchell (Exhibit G); a copy of the letter from Mrs. Mitchell to petitioner (Exhibit H); and a copy of the letter from petitioner to Taff & Company (Exhibit I). Mr. Bradford gave these papers to H. D. Sammis, Vice-President of the City Bank Farmers Trust Company, who placed them in a sealed envelope marked "Confidential % E. Rend Mitchell—Letters and papers re securities with J. P. Morgan & Co., envelope only to be opened on instructions from Mrs. Mitchell or E. F. Barrett, vice-president, National City Bank, or Lindsay Bradford, vice-president, City Bank Farmers, or H. D. Sammis, vice-president City Bank Farmers." On February 18, 1930, the Trust Company gave Barrett a receipt covering this envelope (Exhibit J). This envelope was then placed in the vault of the trust company, in which records of customers were kept.

30. Mrs. Mitchell's account with the City Bank Farmers Trust Company was credited with dividends on 18,300 shares of National City Bank stock as follows:

April 1, 1930	$18,300	April 1, 1931	$18,300
July 1, 1930	18,300	July 1, 1931	18,300
October 1, 1930	18,300	October 1, 1931	18,300
January 2, 1931	18,300	January 2, 1932	18,300

The dividend rate on said National City Bank stock was $4
62 per share per annum, payable quarterly, and this was the dividend rate payable on said stock since April 1929. The fact of said dividend rate was published.

31. During the period from December 20, 1929, to March 24, 1932, there was paid to petitioner from Mrs. Mitchell's account sums in the amounts and on the dates as follows:

April 1, 1930	$59,810.50	April 1, 1931	$48,495.00
July 1, 1930	49,033.84	July 1, 1931	49,033.84
October 1, 1930	49,572.67	October 2, 1931	49,576.67
January 2, 1931	49,572.67	January 2, 1932	49,572.50

Mrs. Mitchell made no payments to petitioner between December 20, 1929, and March 24, 1932, other than those above set forth.

32. On December 25, 1919, petitioner delivered to Mrs. Mitchell a deed covering premises 933 Fifth Avenue, New York City, as a Christmas gift. The property was subject to a first mortgage in the amount of $110,000. On August 2, 1926, Mrs. Mitchell sold the premises 933 Fifth Avenue to Mr. Gordon F. Rentschler, the purchase price of $300,000 being payable $190,000 in cash and the assumption by the purchaser of the outstanding mortgage of $110,000. Under date of August 2, 1926, and June 1, 1928, petitioner wrote to Mrs. Mitchell concerning this transaction (Exhibits 45 and 46). Letters were also written by petitioners to Mrs. Mitchell on September 14, 1926, February 8, 1927, and July 20, 1927,
63 with regard to the payments of $50,000, $25,000, and $15,000 on said dates respectively, which payments, together with the $100,000 referred to Exhibit 46, paid the $190,000 loan. Petitioner's ledger has an entry under August 2, 1926, relating to this matter (Exhibit 47). On December 31, 1926, a statement was prepared showing interest due to Mrs. Mitchell from petitioner on loan (Exhibit 48). Frank W. Black, hereinafter referred to, prepared a work sheet showing computation of interest due from petitioner to Mrs. Mitchell for 1927 (Exhibit 49) and a work sheet showing interest due to her for 1928 (Exhibit 50).

The $190,000 loan by Mrs. Mitchell to petitioner and the sum of $110,000, the amount of the mortgage, were paid by petitioner to Mrs. Mitchell, with interest, over a period of years, and entries in reference to certain of said payments appear in Mrs. Mitchell's books of account (Exhibits E & F iden.) as hereinafter summarized. During the period from December 1919 to December 31, 1932, petitioner made payments and/or gifts to Mrs. Mitchell as follows:

Date	Item	Designation	Amount	Where deposited
1919 Dec. 31	$5,000 Inter. Rapid Transit Rwy. 5's, 66 Bonds.	"Gift from Mr. C. E. M." (Exhibit F. id., p. 55).	[1] $2,850	
1922 Sept. 8	Check	"From C. E. M. (Gift)" (Exhibit D. id., p. 98).	5,000	Business account.
1925 July 29	Check	"CK from Mr. C. E. M. in reimbursement Ins. premiums" (Exhibit E. id., p. 16).	14,346	" "
1926 July 21	Check	"Loan from Mr. C. E. M." (Exhibit E. id., p. 40).	7,000	" "
Sept 14	Check	"Reduction of loan to Mr. C. E. Mitchell" (Exhibit E. id., p. 44).	50,000	" "
64 1927 Feb. 8	Check	"Reduction of loan to Mr. Mitchell" (Exhibit E. id., p. 54).	25,000	" "
Feb. 16	Check	"Interest on loan" (Exhibit E. id., p. 54).	5,541.67	" "
July 21	Check	"Reduction Mr. Mitchell's $190,000 loan" (Exhibit E. id., p. 64).	15,000	" "

[1] Market value.

Date	Item	Designation	Amount	Where deposited
1928				
Mar. 20	Check	"Loan from Mr. C. E. Mitchell" (treated as payment on account of principal of $110,000) (Exhibit E. id., p. 80).	$5,000	Business account.
June 1	500 shs. Hershey Choc. Pfd. Stock. 500 shs. U. S. Realty & Imp. common stock. 200 shs. Johns Manville Corp. common stock. 200 shs. General Motors common stock.	Payment on account of principal (See Exhibit F. id., pp. 95, 110, 111 & Exhibit 46).	147,000	
July 26	Check	"Loan from Mr. C. E. Mitchell" (Exhibit E. id., p. 88).	5,000	Business account.
1929				
Mar. 16	Check	"Check from Mr. C. E. Mitchell" (Interest) (Exhibit E. id., p. 104).	5,000	" "
Mar. 20	Check	"Check from Mr. C. E. Mitchell" (Interest) (Exhibit E. id., p. 104).	15,000	" "
Apr. 29	Check	"Check from Mr. C. E. Mitchell—Int. on loan" (Exhibit E. id., p. 106).	1,686.11	" "
May 2	Check	"Check from Mr. C. E. M.—Reimbursement for charities from Jan. 1, 1929" (Treated as payment on principal) (Exhibit E. id., p. 108).	15,000	" "
June 17	Check	"Gift from Mr. Mitchell" (Treated as payment on principal) (Exhibit E. id., p. 110).	5,000	Business account.
Aug. 5	Check	(Payment on account of principal)	5,000	Personal account.
Dec. 19	Check	"C. E. M. check" (Treated as payment on account of principal) (Exhibit E. id., p. 122).	33,000	Business account.
65				
Dec. 28	Check	"Deposit made by Mrs. Mitchell" (Exhibit E. id., p. 122).	5,000	"
1930				
June 4	$10,000 Rossville Commercial Alcohol 6% Deb. Bonds. $10,000 Lautoro Nitrate 6% Conv. Bonds. $25,000 So. Pac. 40 yr. 4½% Bonds. $5,000 Sugar Estates of Oriente 7% 1942 Bonds.	Wedding Anniversary gift (Letter from petitioner to City Bank Farmers Trust Co. dated June 4, 1930; Exhibit K).	42,500	
July 1	Check	"Proceeds of loan @ 4%" (Exhibit T).	25,000	Principal account
Aug. 21	500 shs. U. S. Realty & Impr. stock.	Birthday Gift (Letter from petitioner to City Bank Farmers Trust Co. Aug. 21, 1930, Exhibit L).	22,500	"
1931				
Jan. 21	Check	Christmas gift (Letter of Petitioner to Lindsay Bradford, Jan. 21, 1931, Exhibit M).	25,000	"
Apr. 10	Check	Gift (Letter, petitioner to City Bank Farmers Trust Co. Apr. 10, 1931, Exhibit N).	30,000	"
June 30	Check	Gift (Letter, petitioner to City Bank Farmers Trust Co. June 30, 1931, Exhibit O).	25,000	"
Aug. 18	Check	Birthday Gift (Letter from Petitioner to Lindsay Bradford Aug. 18, 1931, Exhibit P).	10,000	"
Aug. 18	Check	Gift (Exhibit T)	5,000	Personal account.
Oct. 6	Check	Gift, on occasion of petitioner's birthday (Letter of petitioner to Lindsay Bradford, Oct. 6, 1931, Exhibit Q).	25,000	Principal account.
Dec. 24	Check	Gift	1,000	Personal account.
Dec. 25	Check	Christmas gift (Letter, petitioner to City Bank Farmers Trust Co. Dec. 29, 1931, Exhibit R).	30,000	Principal account.
Aug. 11	Check	Gift (Letter, petitioner to Lindsay Bradford Aug. 11, 1932, Exhibit S).	5,000	Principal account.
Aug. 11	Check	Gift	5,000	Personal account.
Dec. 24	Check	Gift	1,000	"

[1] Market value.

66 In the years 1925 and 1926 the petitioner transferred to Mrs. Mitchell certain policies of insurance on his life and thereafter Mrs. Mitchell paid the premiums thereon as indicated in Exhibits D, iden., E, iden., F, iden., T and U.

33. During the period from 1918 to December, 1929, Mrs. Mitchell participated in the following underwriting syndicate transactions:

(a) Freeport Texas Syndicate, resulting in loss of $15,416.62 (Exhibit 3).

(b) Illinois Central Syndicate—profit of $3,088.78 (Exhibit 38).

(c) Inland Steel Syndicate—no profit or loss (Exhibits 9 and 10).

(d) Westinghouse Syndicate—profit of $3,405.68 (Exhibits 11 and 37).

(e) International-Great Northern Syndicate—profit of $2,643.45 (Exhibit 36).

(f) Wrigley Syndicate—profit $537.33 (Exhibits 12 and 7).

(g) Hupp Motor Syndicate—profit $501.49 (Exhibits 8, 35, 6 and 34).

(h) Second Westinghouse Syndicate—profit of $3,386.02 (Exhibits 21, 32, 20 and 33).

(i) I. R. T. Syndicate—profit $4,187.09 (Exhibits 31, AAAA and 30).

(j) Marland Oil Pool—profit $35,785.95 (Exhibit 18).

(k) Famous Players Syndicate—profit $3,129.37 (Exhibits 17, 29, BBBB and 16).

(l) National Cash Register Syndicate—profit $10,000 (Exhibits 13, 27, 14 and 28).

67 (m) Famous Players Lasky Syndicate—profit $1,809.70 and $452.42 (Exhibits 15, 19, and 26).

(n) B. & O. Syndicate—profit $1,425.94 (Exhibits 25 and 39).

(o) Mackay Syndicate—profit $7,513.75 (Exhibits 24 and 41).

(p) Famous Players Syndicate—profit $991.88 (Exhibits 23, 22, and 40).

(q) Shell Transport and Freight Company Syndicate—profit $3,694.64 (p. 18, Exhibit E, iden.).

(r) Am. Steel Foundry 7% Cum. Preferred Syndicate—profit $750 (p. 14, Exhibit D, iden.).

(s) Anaconda Copper Company—profit $10,335.70 (p. 112, Exhibit D, iden.).

(t) General Motors Syndicate—profit $2,703.60 and $2,542.44 (pp. 42 and 46, Exhibit D, iden.).

34. From 1920 to April 24, 1928, Mrs. Mitchell had accumulated 375 shares of National City Bank stock at a total cost of $101,495.00. By January 17, 1929, Mrs. Mitchell had sold 275 shares of National City Bank stock and 200 rights for a total of $293,209.02, leaving her with a balance of 100 shares, which, by reason of a 5 to 1 split-up, became 500 shares of National City Bank stock after January 1929.

35. Exhibits T and U are transcripts of Mrs. Mitchell's principal and income accounts in the City Bank Farmers Trust Company, and

set forth all the records concerning Mrs. Mitchell's account
68 which appear in the books of City Bank Farmers Trust Company for the period from February 18, 1930, until April 1, 1932.

36. Petitioner paid to J. P. Morgan & Company interest on his loan on the following dates and in the following amounts:

December 31, 1929	$66,506.04	March 31, 1931	$73,335.62
March 29, 1930	83,822.47	June 30, 1931	74,150.46
June 30, 1930	77,048.94	September 30, 1931	74,965.30
October 1, 1930	77,895.63	December 31, 1931	74,722.41
December 1, 1930	77,736.36		

37. On or about October 2, 1931, Herbert Peterson, Assistant Trust Officer of the City Bank Farmers Trust Company delivered to Mr. George Sweeney, petitioner's secretary, a memorandum (Exhibit V) and on or about August 11, 1932, he delivered to Mr. Sweeney a memorandum (Exhibit W). It is hereby agreed that if Mr. Sweeney were called and sworn as a witness to testify in this case, his testimony would be as stated in Exhibit (no exh.) and that the Board may consider said exhibit and give to it the same force and effect as if Sweeney had been duly called and sworn as a witness and testified in open court in the manner set forth therein. Exhibits V and W are referred to in said testimony as Exhibits 21 and 32, respectively.

38. Petitioner's attorneys, Messrs. Cravath, DeGersdorff,
69 Swaine & Wood, wrote a letter dated March 5, 1932 (Exhibit X). Petitioner, by letter dated March 11, 1932, forwarded Exhibit X to Hugh Baker, President of National City Company. Baker caused Exhibit X to be presented to the Board of Directors of that company at a meeting. Petitioner attended this meeting but withdrew therefrom prior to the presentation to the board of Exhibit X and was not present when the matter was under consideration.

The matters referred to in Exhibit X were the subject of conferences among the directors of The National City Company and of the National City Bank before and after the submission of said letter by petitioner as aforesaid and petitioner attended certain conferences concerning his claim referred to in said letter. An informal committee of directors of The National City Company and the National City Bank considered the matter referred to in said letter and took the opinion of Honorable John W. Davis in regard thereto. Thereafter and on June 29, 1932, petitioner wrote to Hugh Baker, President of The National City Company (Exhibit Y).

39. On March 24, 1932, petitioner signed a letter addressed to Mrs. Mitchell (Exhibit Z). On the same date Mrs. Mitchell signed a letter addressed to petitioner (Exhibit AA). On the same date Mrs. Mitchell signed a letter addressed to Taff & Company (Exhibit BB). On the same date Mrs. Mitchell executed a bill of sale (Exhibit CC).

40. Exhibits Z, AA, BB, and CC were drafted by petitioner's counsel, Robert T. Swaine.

41. On March 25, 1932, petitioner signed and delivered a
70 letter to Lindsay Bradford, Vice-President of the City Bank Farmers Trust Company (Exhibit DD). The enclosures referred to in said letter were the original of Exhibit Z and a copy of Exhibit AA. This letter was acknowledged by Lindsay Bradford by letter dated March 25, 1932 (Exhibit EE).

42. From time to time petitioner gave additional collateral to J. P. Morgan & Company to secure the loan established by him with J. P. Morgan & Company on or about October 29, 1929, as set forth in Exhibit 52. From December 20, 1929, the net worth of petitioner declined, until in or about February 1931, petitioner advised J. P. Morgan & Company that he had exhausted all of his assets and was unable to furnish any further collateral. From February 1931, petitioner's financial condition became progressively worse and on March 24, 1932, petitioner was insolvent by an amount in excess of $3,000,000.

43. From 1911 to 1916 Frank W. Black was a partner of petitioner in the firm of C. E. Mitchell & Co. in New York City. From 1913 through 1930 petitioner's income tax returns were prepared by Black as a favor to petitioner. Black obtained the information for making out the returns either from petitioner or from the latter's secretary.

44. Black, with petitioner's knowledge and consent, made a calculation of petitioner's profits and losses on the sales of securities during the year 1929. With regard to petitioner's transaction
71 with reference to the 18,300 shares of National City Bank stock, Black calculated the purchase price to be $6,751,905.50, subtracted therefrom the sum of $3,879,600, being the equivalent of 18,300 shares at $212 per share. The difference of $2,872,305.50 was taken as a loss on petitioner's 1929 federal income tax return.

45. The federal income tax return (Exhibit A) thus prepared by Black was signed and verified by petitioner and forwarded to the office of the Collector of Internal Revenue for the Third Collection District of New York on or before March 15, 1930.

46. Not offered in evidence.

47. Not offered in evidence.

48. The management fund plan of The National City Company, providing additional compensation for certain of its officers was adopted at a meeting of the Board of Directors on February 8, 1921, as set forth in the minutes of said Board of Directors on said date (Exhibit FF). Certain changes in the provisions for said fund were made on January 25, 1927, as shown by the minutes of the meeting of the Board held on said date (Exhibit GG).

49. From 1922 to and including 1928, the distributions from the management fund of The National City Company and the dates thereof were as follows:

7/13/21	$ 196,351.55		7/ 1/26	$186,000.00	
12/22/21	400,000.00		1/ 5/27	508,000.00	
		$596,351.55			$694,000.00
7/ 5/22	375,000.00		7/ 1/27	540,000.00	
1/ 5/23	615,000.00		1/ 4/28	1,010,000.00	
		990,000.00			1,550,000.00
7/ 5/23	150,000.00		7/ 2/28	650,000.00	
1/ 8/24	116,000.00		1/ 3/29	1,450,000.00	
		266,000.00			2,100,000.00
7/ 8/24	175,000.00		7/ 1/29	1,860,000.00	1,860,000.00
1/ 7/25	785,142.92		1/ 2/31	140,938.98	[1] 140,938.98
		960,142.92			
7/ 6/25	305,000.00				
1/ 5/26	649,237.50				
		954,237.50			

[1] See paragraph 59.

50. In 1899 the petitioner had a clerical position with the Western Electric Company and remained with that company until 1907, at which time he was the Assistant Manager. He then became assistant to the President of the Trust Company of America and remained with said trust company until 1911, when he organized the firm of C. E. Mitchell & Company, dealers in investment securities. He continued with that firm until January, 1916, when he became Vice-President of The National City Company. He became
73 President of The National City Company in August 1916, and remained as President until April 1929, when he became its Chairman. During his presidency The National City Company in some years sold over a billion and a half dollars of securities. He became President of The National City Bank in 1921 and remained its President until April 1929, when he became its Chairman, and likewise became Chairman of the City Bank Farmers Trust Company in 1929, which was then absorbed by The National City Bank. He remained Chairman of The National City Company, National City Bank, and City Bank Farmers Trust Company until March 1933.

51. At a meeting of the Board of Directors of The National City Company held on January 2, 1929, action was taken as set forth in the minutes of said meeting (Exhibit HH).

Thereafter, on January 3, 1929, The National City Company deposited $1,450,000 with the Bankers Trust Company of New York for the account of the management fund, which was maintained in the name of S. W. Baldwin, Treasurer, and a distribution of said sum was made as payments from the management fund, petitioner receiving $483,333.33 in accordance with a memorandum dated January 3, 1929 (Exhibit II).

At meetings of the Executive Committee and the Board of Directors of The National City Company both held on January 8, 1929, action was taken as set forth in the respective minutes of said meetings (Exhibit JJ and Exhibit KK). In accordance with

a memorandum dated January 9, 1929, petitioner's percentage of the management fund was fixed as 33⅓% (Exhibit LL).

74 52. At a meeting of the Board of Directors of The National City Company held on June 25, 1929, action was taken as set forth in the minutes of said meeting (Exhibit MM). Thereafter, on July 1st, The National City Company deposited $1,860,000 with Bankers Trust Company for the account of management fund, which was maintained in the name of S. W. Baldwin, Treasurer, and a distribution of said sum was made as payments from the management fund, petitioner receiving $666,666.67, in accordance with a memorandum dated June 27, 1929 (Exhibit NN).

53. In computing the amounts available for payments to the participants in the management fund, computations were made at the end of each month and credited to the account kept for that purpose entitled "Reserve for other Deductions" in those months in which there were accretions to said fund. In those months in which the company suffered losses, this account was correspondingly reduced. Credits were made to this account during every month of 1929 through the month of October. For the months of November and December there were no credits to this account, and the losses of The National City Company during the said months exceeded the profits which it made during the first ten months of the year. Calculations of the management fund, during 1929, by H. F. Mayer, Vice-President and Comptroller of The National City Company, are shown in his work-sheets (Exhibit 57).

54. During the first half of December 1929, a form of

75 receipt was prepared. Petitioner signed a receipt in this form as set forth in Exhibit OO. Receipts in similar form were signed by all of the participants in the distribution of the management fund of July 1, 1929. Said receipts were placed in an envelope marked "Accounts Receivable S. W. Baldwin Treasurer, Special Account Management Fund 1929," which envelope thereafter remained in the vaults of The National City Company. Other records of the company were kept in the same vault.

55. At a meeting of the Board of Directors of The National City Company held on December 30, 1929, action was taken as set forth in the minutes of said meeting (Exhibit PP).

56. As of December 30, 1929, there was set up on the accounts receivable and payable ledger of The National City Company a debit to "Accounts Receivable and Payable" and a credit to "Reserve for other Deductions" in the amount of $1,860,000. This entry was carried forward to the year 1930.

57. At a meeting of the Board of Directors of The National City Company held on January 9, 1930, action was taken as set forth in the minutes of said meeting (Exhibit QQ).

Thereafter, on or about January 18, 1930, petitioner sent a letter to each of the participants in the management fund distribution of July 1, 1929, a copy of which is set forth in Exhibit RR.

58. Prior to March 15, 1930, petitioner received a memorandum from The National City Company (Exhibit 5B), which petitioner gave to Sweeney, his secretary, to be handed to F. W. Black, above referred to, who was preparing petitioner's federal income tax return. This paper was handed by Sweeney to Black. The National City Company on its federal income tax return for the calendar year 1929 did not deduct any part of the distribution of the management fund of July 1, 1929, as compensation paid to its officers or otherwise. Without the benefit of such deduction the federal income tax return of The National City Company for 1929 showed a net loss of several million dollars in excess of $1,860,000.

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59. At a meeting of the Board of Directors of The National City Company held on December 30, 1930, action was taken as set forth in the minutes of said meeting (Exhibit SS).

On or before January 2, 1931, payments were made as shown in Exhibit TT, aggregating $140,938.98 out of the account known as "Reserve for other Deductions" this sum being the balance left in this account in January 1929 after all distributions had been made. The petitioner received on this distribution the sum of $50,515.53.

60. At a meeting of the Board of Directors of The National City Company held on January 6, 1931, action was taken as set forth in the minutes of said meeting (Exhibit UU).

61. At a meeting of the Board of Directors of The National City Company held on January 9, 1931, action was taken as set forth in the minutes of said meeting (Exhibit VV). A copy of the balance sheet and analysis of surplus and reserves referred to in said minutes is set forth in Exhibit WW.

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62. At a meeting of the Board of Directors of The National City Company held on December 28, 1931, action was taken as set forth in the minutes of said meeting (Exhibit XX).

Thereafter, on the 31st day of December 1931, on the books of The National City Company accounts receivable and payable (Treasurer's Account Special) was credited, and "Surplus and Reserves" was debited in the sum of $150,000, the amount of Joseph Ripley's participation in the management fund distribution of July 1, 1929, thus reducing the Treasurers' Account Special as shown on the books, from $1,860,000 to $1,710,000.

63. By journal ticket No. 196,377 adjustments were made on the books of The National City Company as shown in said ticket (Exhibit YY).

64. At a meeting of the Board of Directors of The National City Company held on October 10, 1932, action was taken as set forth in the minutes of said meeting (Exhibit ZZ).

The indebtedness of L. E. Olwell, Vice-President of The National City Company, referred to in said minutes, represented moneys borrowed from the company and did not include $70,000 received by Olwell from the distribution from the management fund made in

July 1929. Olwell withdrew from The National City Company in 1932, and was not in its employ on October 10, 1932.

65. At a meeting of the Board of Directors of The National
78 City Company held on December 27, 1932, action was taken as set forth in the minutes of said meeting (Exhibit AAA).

By journal tickets 11,785 and 11,786, adjustments were made on the books of The National City Company as shown in said tickets (Exhibits BBB and CCC).

66. On December 30, 1932, after the "S. W. Baldwin Treasurer Special Account" had been written down to $1 and closed out of "Accounts Receivable and Payable," entries were made on a page in a loose-leaf memorandum book by Frank W. Maguire, Assistant Secretary of The National City Company (Exhibit DDD). All of the entries appearing on Exhibit DDD were made at the same time. Aside from the receipts referred to in paragraph 54 hereof, this was the only breakdown in the books and accounts of The National City Company showing the items included in the "S. W. Baldwin Treasurer Special Account," or the names of the individuals involved.

67. During the years 1921 to 1930, inclusive, petitioner received a salary of $25,000 per annum from The National City Company. Petitioner's salary from the Company up to this time never exceeded the sum of $25,000 per annum.

At a meeting of the Board of Directors of The National City Company held on June 22, 1931, action was taken as set forth in the minutes of said meeting (Exhibit EEE), and the schedule attached (Exhibit FFF).

68. During the years 1929, 1930, 1931, 1932, and 1933, respectively, petitioner received from the National City Company the following sums:

79 Year	Salary	Management fund
1929	$25,000.00	$1,500,000.00
1930	25,000.00	0
1931	75,000.00	[1] 50,515.33
1932	75,000.00	0
1933 for two months—same rate		0

[1] See ¶ 59.

Subsequent to the year 1929 there were no further accumulations to the management fund and no distribution was made from the management fund, except the sum of $140,938.98 (referred to in paragraph 59), which sum remained in the management fund after the payment of the distribution made in January 1929 (referred to in paragraph 52). No portion of said distribution of $140,938.98 was applied against the payments made in July 1929 from the management fund. The National City Company never demanded or received of or from any of the parties who received payments from the management fund distribution, made in July 1929, any part of

this distribution except that action was taken in regard to Joseph P. Ripley as set forth in the minutes of December 31, 1931 (Exhibit XX) and that on December 10, 1933, Gordon Rentschler voluntarily paid to The National City Company $100,000, the amount which he had received from the distribution of July 1929. No payment has been made by petitioner to The National City Company of any part of the sum received by him from the July 1, 1929, management fund distribution.

69. With petitioner's knowledge and consent, F. W. Black, above referred to, in preparing petitioner's federal income tax re-
80 turn for the calendar year 1929, did not include the item of $666,666.67 which appeared in petitioner's books as having been received by petitioner from the management fund of The National City Company on or about July 1, 1929.

70. On December 24, 1930, and prior thereto, petitioner was one of the directors of the Anaconda Copper Mining Company. John D. Ryan was Chairman of the Board of Directors of the same company and was a friend of the petitioner and had been a friend of his for many years.

71. Between January 15, 1929, and June 18, 1929, petitioner had acquired 10,000 shares of Anaconda stock at a cost of $1,163,104.38 and owned such stock on December 24, 1930.

72. William D. Thornton in December 1930 was President of the Greene Cananea Copper Company, a subsidiary of the Anaconda Copper Mining Company. Mr. Thornton was a friend and business associate for 30 years of John D. Ryan.

73. It is hereby agreed that if Mr. Thornton were called and sworn as a witness to testify in this case, his testimony would be as stated in Exhibit LLL, iden., and that the Board may consider said exhibit and give to it the same force and effect as if Thornton had been duly called and sworn as a witness and testified in open court in the manner therein set forth.

74. On December 24, 1930, petitioner telephoned to George Whitney, a member of J. P. Morgan & Company, concerning a
81 loan to Thornton from J. P. Morgan & Company for $229,500, to be secured by 11,000 shares of Anaconda Copper mining stock as collateral, and on December 26, 1930, petitioner wrote a long-hand note to George Whitney, a copy of which is set forth as Exhibit GGG.

75. On December 26, 1930, petitioner also wrote a letter to J. P. Morgan & Company (Exhibit HHH) and on the same day petitioner wrote a letter to John D. Ryan (Exhibit III). The enclosures referred to in the latter letter were a copy of Exhibit HHH and a draft of a letter to be written by Thornton to J. P. Morgan & Company (Exhibit JJJ). This draft was delivered by Ryan to Walter P. Adams, the accountant for both Thornton and Ryan, who caused a copy of Exhibit JJJ to be made, signed by Thornton and sent to J. P. Morgan & Company (Exhibit KKK).

76. On December 26, 1930, the 2,500 shares of Anaconda Copper Mining Company stock, referred to in Exhibits GGG and KKK, were sent to J. P. Morgan & Company as additional collateral for Thornton's demand loan of $229,500. Said 2,500 shares were the property of John D. Ryan and stood in the name of Hornblower & Weeks, and were endorsed in blank.

77. The rate of interest charged by J. P. Morgan & Company on this loan was 5% per annum. In December 1930, Thornton had collateral loans with two banks. During the latter part of 1929 and the early part of 1930 the interest rate on said loans had
82 been 6% and was thereafter reduced to 5½%, 5% and finally on June 20, 1930, and June 27, 1930, to 4½%, which rate continued in effect through 1930. Prior to December 26, 1930, Thornton individually had never had any business with J. P. Morgan & Company.

78. On December 26, 1930, J. P. Morgan & Company wrote to Thornton (Exhibit MMM). On the same date J. P. Morgan & Company acknowledged receipt of petitioner's letter advising him of the delivery of the 8,500 shares of Anaconda stock to Thornton and that they had used the $229,500 received from Thornton by paying $170 for stock transfer stamps and applying the balance of $229,330 as a credit upon petitioner's demand loan (Exhibit NNN).

79. The Thornton loan with the collateral referred to above was set up on J. P. Morgan & Company's books of account. On December 26, 1930, J. P. Morgan & Company requested Thornton to advise them in what name he wished the 8,500 shares to be registered, and on December 29, 1930, Thornton replied asking that they be registered in the name of the Morgan nominee. J. P. Morgan & Company thereupon had the 8,500 shares transferred to the name of their nominee, "C. S. Hawkins," and endorsed in blank by him. The certificates were for 100 shares each and bore certificate No. 392135–219.

80. In the latter part of January or in the early part of February 1931, Ryan and Thornton left for California and did not return until the end of April 1931.

83 81. On February 16, 1931, J. P. Morgan & Company received $5,312.50 representing a quarterly dividend of 62½ cents per share on the 8,500 shares of Anaconda Copper Mining Company stock which was applied on account of the principal of Thornton's demand loan and wrote a letter to Thornton in regard thereto (Exhibit OOO).

82. The same dividend on the 2,500 shares of Anaconda Copper Mining Company stock held by J. P. Morgan & Company as collateral to Thornton's loan, but still registered in the name of Hornblower & Weeks, was received by Hornblower & Weeks and credited to the account of John D. Ryan known as number 1-2-3. Ryan was advised by Hornblower & Weeks of this credit.

83. Prior to March 14, 1931, petitioner furnished to F. W. Black, above referred to, the figures concerning his income for the calendar year 1930. Petitioner's federal income tax return for the calendar year 1930 was prepared by Black, who computed a net loss resulting from the sales of securities for that year of $683,318.42. With petitioner's knowledge and consent, Black computed a loss by taking the difference between the cost price of said 8,500 shares of Anaconda of $988,248.25 and the sum of $229,330, referred to in ¶ 78. This difference, namely $758,918.25 was taken as a deduction on petitioner's federal income tax return for the calendar year 1930 so prepared by Black. Petitioner signed and verified said return and filed the same with the Collector of Internal Revenue for the Third New York Collection District (Exhibit B).

84 84. On March 28, 1931, J. P. Morgan & Company sent to Thornton a statement showing the interest due on his loan on March 31, 1931, and was requested by Walter P. Adams, referred to above, to increase the principal of the loan by the amount of the interest. On March 31, 1931, J. P. Morgan & Company wrote to Thornton that they had so increased the principal of his loan by $2,996.40 in lieu of payment of the interest (Exhibit PPP).

85. On April 23, 1931, Ryan advised Hornblower & Weeks to credit the quarterly dividend on his 2,500 shares of Anaconda, payable on May 18, 1931, to his account known as number 1-2-3.

86. During the period between December 26, 1930, and May 4, 1931, the market price of Anaconda stock on the New York Stock Exchange had a price range of 25⅞ as the low and 43¼ as the high, the high point being reached on February 27, 1931, and the low point on May 4, 1931. At no time after December 26, 1930, and prior to May 1, 1931, did the stock sell as low as 27.

87. On May 4, 1931, Thornton wrote to J. P. Morgan & Company asking them to deliver to Hornblower & Weeks for his account the 11,000 shares of Anaconda stock held by J. P. Morgan & Co. for his account against receipt of $228,256.71, the principal and interest due to J. P. Morgan & Company (Exhibit QQQ). On the same day Thornton also wrote to Hornblower & Weeks asking

85 them to pay said sum to J. P. Morgan & Company, and to accept said 11,000 shares for his account.

88. On May 4, 1931, J. P. Morgan & Company delivered said 11,000 shares to Hornblower & Weeks, and received from Hornblower & Weeks the amount of Thornton's debit balance to J. P. Morgan & Company in the sum of $228,256.71, which amount was charged to Thornton's account by Hornblower & Weeks. Certificates representing 2,500 of these shares were the same certificates which had been delivered to J. P. Morgan & Company as collateral for Thornton's loan, and such shares on May 4, 1931, were still the property of Ryan.

89. On May 4, 1931, Ryan placed an order with Hornblower & Weeks to purchase 8,500 shares of Anaconda stock for an account

to be opened with Hornblower & Weeks for the petitioner and at the same time to sell 8,500 shares of Anaconda stock for Thornton's account. This was the first account that the petitioner had with Hornblower & Weeks. Ryan and Thornton transacted most of their brokerage business through Hornblower & Weeks.

90. Both orders were executed on the floor of the New York Stock Exchange on said date at 26⅝. The transaction was handled in accordance with the Rules of the New York Stock Exchange, which required that cross-orders be executed by offering the stock for sale on the market at one-eighth of a point higher than the existing market price before such sale could be consummated
86 at the market price. Such offers are public offers and may be accepted by any member of the Exchange under the Rules of the New York Stock Exchange then in force. The sale of 8,500 shares of Anaconda stock at 26⅝ was recorded on the ticker-tape which reported transactions on the Exchange on said date.

91. On May 6, 1931, Hornblower & Weeks tendered delivery to petitioner of 11,000 shares of Anaconda to be taken up against the payment of the purchase price of 8,500 shares aggregating $227,587.50. Petitioner advised Hornblower & Weeks that he did not have the money ready on that day to take up the stock, but that he would take it up the following day. The stock was thereupon returned to Hornblower & Weeks. The "Stock Delivered" ledger of Hornblower & Weeks records this transaction (Exhibit RRR).

92. On May 6, 1931, petitioner arranged with the Guaranty Trust Company for a loan of $200,000 against suitable collateral, and wrote to the Guaranty Trust Company confirming this arrangement and asking it to pay Hornblower & Weeks $200,000 against delivery of 11,000 shares of Anaconda stock (Exhibit SSS). Petitioner signed a loan application in the usual form of the Guaranty Trust Company, together with a power of attorney for the collateral (Exhibit TTT). On the same date petitioner wrote to Hornblower & Weeks to deliver 11,000 shares of Anaconda stock to the Guaranty Trust Company on May 7th (Exhibit UUU), and enclosed his check to their order for $27,628.60. This sum represented the difference between $200,000 and the purchase price of said 8,500 shares.
87 93. In accordance with the petitioner's instructions of May 6, 1931, Hornblower & Weeks delivered 8,500 shares of Anaconda Copper Mining Company stock together with the 2,500 shares of Anaconda stock, which were the property of John D. Ryan, to the Guaranty Trust Company on May 7, 1931. The certificates for 2,500 shares so delivered to the Guaranty Trust Company by Hornblower & Weeks, were the same certificates that had been received by Hornblower & Weeks from J. P. Morgan & Company for Thornton's account. The certificates for 8,500 shares so delivered were not the same certificates that had been received by Hornblower & Weeks from J. P. Morgan & Company.

94. On May 7, 1931, the Guaranty Trust Company advised petitioner that it had received from Hornblower & Weeks 11,000 shares of Anaconda stock against the payment by it of $200,000, and on the same day Hornblower & Weeks advised petitioner of that delivery against $200,000, and acknowledged receipt of petitioner's check for $27,628.60, being the balance of the total purchase price of the 8,500 shares plus $41.10 interest.

95. On May 7, 1931, petitioner wrote a letter to Ryan, a copy of which is set forth in Exhibit VVV. The notation on the bottom of said letter is in the handwriting of Ryan.

96. On May 18, 1931, J. P. Morgan & Company sent to Thornton their check for $3,187.50 covering dividend of 37½ cents a share on 8,500 shares of Anaconda stock, which dividend had
88 been declared prior to May 4, 1931, and was not payable until May 18, 1931. On May 22, 1931, Thornton enclosed, in a letter to Hornblower & Weeks (Exhibit WWW), his check for $3,415.02, the balance due on the account.

97. Not offered in evidence.

98. Prior to May 18, 1931, Walter P. Adams, above referred to, prepared a memorandum, a copy of which is set forth in Exhibit XXX. This memorandum was handed to petitioner by Ryan, and petitioner turned the same over to F. W. Black, in whose possession it remained.

99. In Thornton's federal income tax return for the calendar year 1930, which return was prepared by Adams, Thornton reported a purchase of 8,500 shares of Anaconda stock on December 26, 1930, and a sale of 8,500 shares of Anaconda stock on May 4, 1931, resulting in a loss on the transaction in the amount of $201.71, after taking into account interest paid and dividends received.

100. In the calendar year 1930, dividends of $73,200 were paid on the 18,300 shares of National City Bank stock registered in the name of Taff & Company and held by J. P. Morgan & Company as collateral for petitioner's loan account. In his 1930 federal income tax return petitioner reported $18,300 of this sum, being the dividend declared December 3rd, 1929, and payable January 1st, 1930, to stockholders of record on December 7th, 1929, and in her
89 return for the calendar year 1930 Mrs. Mitchell reported the balance of $54,900, as dividends received from 18,300 shares of National City Bank stock. For the same year Mrs. Mitchell deducted as interest paid to petitioner during said year the sum of $158,417.01.

101. For the calendar year 1931 Mrs. Mitchell reported on her individual tax return the sum of $73,200 as dividends received from 18,300 shares of National City Bank stock. For the same year Mrs. Mitchell deducted as interest paid to petitioner during said year the sum of $196,678.18.

102. During the calendar years 1929 and 1930, petitioner's federal income tax returns were filed on the basis of cash receipts and disbursements.

103. Not offered in evidence.

104. Not offered in evidence.

105. On April 25, 1933, an indictment was returned against petitioner by a Grand Jury of the District Court of the United States for the Southern District of New York (Exhibit 59). To both counts in that indictment the petitioner entered a plea of not guilty.

106. Thereafter, petitioner was tried upon the charges contained in said indictment before Judge Henry W. Goddard and a trial jury in the said United States District Court, the trial commencing May 11, 1933, and terminating on June 22, 1933. A copy of the court's charge to the jury is contained in Exhibit 60.

90 107. On June 22, 1933, a verdict of not guilty was returned by the jury on all counts of the indictment. A copy of the docket entries is Exhibit 61.

April 25th, 1934.

(Signed) William Wallace,
WILLIAM WALLACE,
Attorney for the Petitioner.
ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

The foregoing printed stipulation (dated April 25, 1934), as amended by ink erasures and/or interlineations, correctly sets forth the paragraphs thereof that were received and read in evidence at the trial of this proceeding. Paragraphs 46, 47, 97, 103, and 104 thereof were not offered or read in evidence.

The exhibits identified by letters or numbers and so referred to in the paragraphs offered and read, were themselves offered and received in evidence on that trial, save only Exhibits D-id, E-id, and F-id, referred to in paragraph 20 thereof. These three exhibits were marked for identification only, although certain extracts therefrom were offered and read in evidence, as appears from the minutes of the trial proceedings.

Of the exhibits so offered and read, those identified by letter reference were offered by respondent; while those identified by number reference were offered by petitioner.

91 Three copies of said stipulation as thus corrected are filed herewith in accordance with the stipulation of counsel, entered on page 623 of the minutes of the trial proceedings.

WILLIAM WALLACE,
Attorney for the Petitioner.
ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket No. 74,720

CHARLES E. MITCHELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Promulgated August 6, 1935

[This proceeding was heard by a Special Division, consisting of Adams (presiding), Lansdon, and Van Fossan. Lansdon's term expired June 2, 1934, and he ceased to be a member of the Board. Adams died on January 29, 1935.]

1. Taxpayer and his wife exchanged letters purporting to
92 consummate a sale of 18,300 shares of bank stock. The sale price was approximately four million dollars; the wife's total fortune less than one million. Taxpayer by "gifts" provided his wife with sufficient funds in excess of dividends to pay taxpayer the agreed "interest"; no notice of a sale was given to the bank with which the stock was pledged to secure taxpayer's loan; no revenue stamps were affixed; no bill of sale executed; no entry of indebtedness was entered on the wife's books of account. Although taxpayer's wife claimed to have bought in order to resell at a profit, no sale was made notwithstanding there was such an improvement in the market that the stock could have been sold at a profit of three-quarters of a million dollars to her. Taxpayer, without revealing the fact of a sale, made claim against the National City Co. for relief from the burden of the original purchase of the stock, and subsequently when the market price was $45 per share went through the form of a repurchase from his wife at a price of $212 per share. Held, that the transaction was not a bona fide sale and the alleged loss did not constitute an allowable deduction from income.

2. Held, further, that the alleged sale was fraudulent with intent to evade taxes.

3. Held, that a payment from the management fund of the National City Co. received, retained, and enjoyed by tax-
93 payer was income, notwithstanding the subsequent signing of a "receipt" by taxpayer acknowledging the payment to have been an overpayment to be repaid from future additions to the fund before any further payments should be made.

4. Held, further, the failure to report such payment for taxation was fraudulent with intent to evade tax.

5. Held, the sale and repurchase by petitioner of stock of Anaconda Copper Mining Co. were bona fide and the loss sustained on the sale constituted an allowable deduction from income.

6. Held, the failure by taxpayer to report for taxation dividends paid in 1930 on the stock which was the subject of the fraudulent sale in 1929 rendered petitioner's return for 1930 fraudulent.

7. Section 146 (b) of the Revenue Act of 1928 contemplates criminal prosecution by the United States for the alleged commission of a felony. Section 293 (b) allows the imposition of a fraud penalty of 50 percent of a deficiency as an aid in collection of revenues. The indictment and acquittal of taxpayer in a criminal case in the Federal District Court for violation of section 146 (b) of the Revenue Act of 1928 do not bar the imposition of the penalty of 50 percent of the deficiency under section 293 (b) in a proceeding before the Board.

94 8. Where respondent in his notice of deficiency determines that a deficiency is due to fraud with intent to evade tax and a petition is filed denying fraud and the case proceeds to hearing, and evidence is introduced by both parties on the fraud issue, no motion having been made for judgment for failure of petitioner to file a reply to allegations of fraud in respondent's answer, and after the close of the hearing, on leave granted, a reply is filed, held, the fraud charges do not stand admitted under the pleadings and the rules of the Board. The filing of the reply, with leave given, satisfied the rules of the Board, and the burden of proof of fraud rested on the respondent.

William Wallace, Esq., Leonard Moore, Esq., and Robert Reed, Esq., for the Petitioner.

Edward S. Greenbaum, Esq., Thomas E. Dewey, Esq., J. D. Head, Esq., and Nathan Gammon, Esq., for the Respondent.

This proceeding involves income taxes and penalties for the calendar years 1929 and 1930, determined by the respondent as follows:

Year	Deficiency in tax	50 percent penalty	Total deficiency
1929	$728,709.84	$364,354.92	$1,093,064.76
1930	121,719.84	60,859.92	182,579.76
Total	850,429.68	425,214.84	1,275,644.52

The pleadings raise the following issues:

1. Are the assessment and collection of the deficiencies, or
95 either of them, barred by the statute of limitations (sections 275 and 276 of the Revenue Act of 1928), or, otherwise stated, did petitioner file false and fraudulent returns for the tax years or either of them?

2. Did petitioner realize a deductible loss upon a sale to his wife of 18,300 shares of the capital stock of the National City Bank of New York on December 20, 1929?

3. Did the amount of $666,666.67 received by petitioner on or about July 1, 1929, as a distribution from the management fund of the National City Co. constitute taxable income to him in that year?

4. Did petitioner realize a deductible loss upon a sale of 8,500 shares of the capital stock of the Anaconda Copper Mining Co., on December 26, 1930?

5. Did petitioner realize income in 1930 in the amount of $54,900 from dividends paid to petitioner's wife on the 18,300 shares of National City Bank stock included in the transaction between petitioner and his wife on December 20, 1929?

6. Is the redetermination of petitioner's tax liability for the years 1929 and 1930 barred by the acquittal of present petitioner in the case of United States v. Charles E. Mitchell, that case being a prosecution of petitioner under section 146 (b) of the Revenue Act of 1928?

In his answer to the petition, the respondent affirmatively alleged that petitioner's returns for the years 1929 and 1930 were
96 false and fraudulent with intent to evade tax. The petitioner, after leave given, filed a reply August 6, 1934, denying the affirmative allegations of the respondent.

Findings of Fact

1. The petitioner, an individual residing in New York City, is a business man and banker of wide experience. For many years prior to 1929 he had been president of the National City Bank of New York and the National City Co. In April 1929 he became chairman (the chief executive officer) of the National City Bank, the National City Co., and also the City Bank Farmers Trust Co., which was then absorbed by the National City Bank. He remained chairman of these institutions until March 1933. In 1929 all the stock of the National City Co. was held by trustees for the benefit of the stockholders of the National City Bank. In December 1929 there were outstanding approximately five million shares of stock of the National City Bank.

2. On March 15, 1930, the petitioner filed his Federal income tax return for the calendar year 1929. This return was filed on the basis of cash receipts and disbursements, and it showed a net loss of $48,899.65. The petitioner did not report in his return of gross income an amount of $666,666.67 received by him on or about July 1, 1929, as a distribution from the management fund of the National City Co., and in computing net income an amount of $2,872,305.50 was deducted as a loss sustained by petitioner upon a sale of 18,300
97 shares of National City Bank stock to his wife, Elizabeth R. Mitchell, on December 20, 1929.

In determining the deficiency here in question for the taxable year 1929, the respondent included in gross income as additional compensation the $666,666.67 received by petitioner from the management fund of the National City Co. and disallowed the deduction of $2,872,305.50, claimed as a loss on a sale of the 18,300 shares of National City Bank stock to Mrs. Mitchell. Other losses on sales were disallowed in the sum of $3,668.40. The respondent also de-

termined that the deficiency was due to fraud with intent to evade tax and added to the deficiency the statutory penalty of 50 percent of the tax.

3. On March 14, 1931, the petitioner filed his Federal income tax return for the calendar year 1930. This return was filed on the basis of cash receipts and disbursements and showed net income in the amount of $8,552.40. He paid no income tax for that year. Petitioner did not report in his return of gross income an amount of $54,900, representing dividends upon the 18,300 shares of National City Bank stock which was the subject of the transaction on December 20, 1929, between petitioner and his wife. In computing net income an amount of $758,918.25 was deducted as a loss sustained upon a sale of 8,500 shares of the capital stock of the Anaconda Copper Mining Co. to W. D. Thornton on December 26, 1930. In determining the deficiency here in question for the taxable year 1930, the respondent included in petitioner's gross income the $54,900, representing dividends upon said 18,300 shares of National City
98 Bank stock and disallowed the deduction of $758,918.25 claimed as a loss upon a sale of 8,500 shares of Anaconda Copper Mining stock to Thornton. These, with other adjustments not in controversy, resulted in the proposed deficiency. Respondent further determined that the deficiency was due to fraud with intent to evade tax and added the statutory penalty of 50 percent of the tax.

4. From 1913 through 1930 petitioner's income tax returns were prepared by Frank W. Black, a former partner of petitioner. He obtained the information for making out the returns either from petitioner or the latter's secretary. Black, with petitioner's knowledge and consent, computed petitioner's profits and losses on the sale of securities during the taxable years. Petitioner signed and verified the returns prepared by Black and filed them with the collector of internal revenue for the third collection district of New York.

5. Under date of October 1, 1929, the National City Bank and the Corn Exchange Bank Trust Co., pursuant to the action of the directors of both banks, entered into an agreement of consolidation, subject, however, to ratification by the shareholders of both banks at meetings to be held on November 7, 1929. The agreement of consolidation provided for the exchange of four shares of National City Bank stock for five shares of Corn Exchange Bank stock. As part of the agreement, the National City Co. agreed to purchase
99 at $360 per share in cash, any shares of Corn Exchange Bank stock which might be tendered it for purchase within 20 days after the date of consolidation. The effect of the agreement to purchase Corn Exchange Bank stock at $360 per share was to place an equivalent price on National City Bank stock of $450 per share.

On October 28, 1929, the National City Co., in an apparent effort to support the price of the National City Bank stock, purchased 71,469

shares of that stock at a cost of approximately $32,000,000. These purchases increased the National City Co.'s holdings in that stock to 83,671 shares. Late in the afternoon of the same day petitioner learned of these purchases and, being of the opinion that the National City Co. should not purchase more of this stock, decided to use his personal credit to support the stock.

6. On the morning of October 29, 1929, petitioner arranged with J. P. Morgan & Co. for a personal credit up to $12,000,000, against which he could buy stock, to be secured by National City Bank stock as collateral, at a value for the purpose of not more than $200 per share. A special account was opened on the books of the National City Co. for shares of the National City Bank purchased for petitioner's account. Petitioner advised the president of the National City Co. of his arrangement with Morgan & Co. and authorized him to buy for his account.

7. On October 29, 1929, the National City Co. bought in the market for petitioner's account an aggregate of 28,300 shares at an average cost of $367.0028 per share, totaling $10,386,179.50. These
100 shares were registered in the name of Taff & Co., as nominee of the National City Co. The shares so purchased were delivered to Morgan & Co., who charged the cost thereof against petitioner's credit of $12,000,000.

8. About November 4, 1929, the National City Co. sold for petitioner's account 4,000 of the 28,300 shares of National City Bank stock at $435 a share, and 1,000 shares at $425 a share. About November 6, 1929, it sold 5,000 additional shares thereof at $425 a share. The aggregate price of the 10,000 shares sold was $4,290,000. This sum was credited by Morgan & Co. against petitioner's loan account, leaving a balance due from petitioner on the 18,300 shares remaining of $6,096,179.50, for which sum Morgan & Co. held as collateral 30,000 shares of National City Bank stock registered in petitioner's name and the remaining 18,300 shares registered in the name of Taff & Co. Morgan & Co. continued to hold this collateral for petitioner's loan at all times hereinafter referred to. The National City Co. made no further sales from the stock it had purchased for petitioner's account on October 29, 1929. The petitioner realized a profit of $655.726 from the 10,000 shares sold, which profit was reported on his income tax return for 1929.

9. On December 4, 1929, a stock purchase plan was put forth by the directors whereby National City Bank stock was offered to employees at the price of $200 per share. On or about December 20, 1929, 50,000 shares of National City Bank stock were allotted to the plan. Over 100,000 shares were applied for. Thereafter 10,000
101 additional shares were allotted to officers of the National City Bank and affiliated companies at $220 per share. This offering was also oversubscribed.

10. Prior to December 20, 1929, petitioner had realized profits from the sales of securities during the year 1929 of $1,388,237.97,

which amount included the profit of $655,726 realized on the sale of the total of 10,000 shares of the 28,300 shares of National City Bank stock. In addition to these profits from the sales of securities, petitioner received during the year 1929 from the National City Bank and the National City Co. salaries and payments from management funds in the sum of $1,206,195.02, exclusive of the sum of $666,666.67 received on or about July 1, 1929, from the management fund of the National City Co.

11. Prior to the middle of December 1929, petitioner determined that he would not report as taxable income the payment of $666,666.67 received as a distribution from the management fund. Petitioner realized that he would have a very large gross income for the taxable year 1929. This income was in an amount in excess of $2,800,000. The market price of National City Bank stock was $212 per share on December 19, 1929. Accordingly, and for the purpose of "registering a loss" he considered ways and means of disposing of the National City Bank stock in order that he might take a deduction of the difference between its purchase price and the then market, which difference amounted to $2,872,305.50 on December 19, 1929.

102 12. From 1918 to 1930, petitioner had had occasional business transactions with his wife, Elizabeth R. Mitchell, which were recorded in his books of account. In 1919 she had loaned him $23,903.80 which was repaid by him in that year. In 1920 she loaned him $125,000 par value of bonds which were returned to her by him. In 1920 she purchased 35 shares of National City Bank stock from her husband and gave him her check covering the purchase price. From 1918 to 1922 petitioner carried a loan or "special account" with Mrs. Mitchell, paying her 3 percent interest. The loan was repaid in 1922. In 1926 he paid her $2,034.51 in connection with a stock adjustment of International Telephone & Telegraph stock, and purchased from her 250 shares of International Telephone & Telegraph rights for $2,212.50. In 1929 Mrs. Mitchell sold him 500 International Telephone & Telegraph rights for $3,250. From 1918 to 1929 Mrs. Mitchell had participated in a number of underwriting syndicate transactions, in most of which she realized a profit. From 1920 to April 24, 1928, Mrs. Mitchell had accumulated 375 shares of National City Bank stock at a total cost of $101,495. By January 17, 1929, Mrs. Mitchell had sold 275 shares of National City Bank stock and 200 rights for a total of $293,209.02, leaving her with a balance of 100 shares which, by reason of a five to one split-up, became 500 shares of National City Bank stock after January 1929.

13. On December 20, 1929, Elizabeth R. Mitchell had total assets having a then market value as follows:

103	Bonds	$260,336.19	Mortgage participations [1] $50,000.00
	Stocks	577,630.13	
Garage [1]		21,000.00	Total 940,994.12
Cash in banks		32,027.80	

[1] The cost of the garage and the par value of the mortgage participation are as stated above. The market value is unknown.

exclusive of jewelry, furniture, objects of art, books, and the cash value of life insurance policies on the life of the petitioner.

14. Petitioner discussed with Mrs. Mitchell the matter of a sale to her of the 18,300 shares of bank stock on the night of December 19, 1929. No definite agreement to buy or sell was made at that time.

On December 20, 1929, petitioner consulted Harry W. Forbes, a member of the law firm of Shearman & Sterling, general counsel for the National City Bank and the National City Co., who had specialized in Federal income tax matters. He advised Forbes that he had a large block of National City Bank stock which represented a big loss and that he had arranged to sell the stock to Mrs. Mitchell, provided he could take a loss for tax purposes by so doing. Forbes informed petitioner that the Treasury Department regarded all such transactions between husband and wife with a great deal of scrutiny and asked him why, if that was stock which he really intended to sell, he did not sell it in the open market so that there could be
104 no question about the sale. To this petitioner replied that it was a large block of stock which he could not sell on the open market without causing the price to decline and, besides that, he felt confident that after the first of the year the stock would increase in value, and for those reasons he wanted to sell the stock to Mrs. Mitchell so he could take his loss on his income tax return for 1929 and she could have the advan'ge of disposing of the stock at the higher price later on.

Petitioner asked if sales between husband and wife were not recognized for income tax purposes, and was told that they were where a sale was made in good faith for fair market value and the wife was financially responsible. Petitioner said he was making an absolute sale at the current market value and that Mrs. Mitchell had resources of her own. Petitioner did not tell Forbes the amount of Mrs. Mitchell's personal estate. Forbes inquired of petitioner whether Mrs. Mitchell could pay cash and take delivery of the stock, and petitioner told him that she did not have the cash available and that he could not deliver the stock because it was pledged as collateral security for the loan with Morgan & Co. Forbes then asked if Mrs. Mitchell could take over the loan of Morgan & Co., and petitioner said that could not be done because the loan was for a much larger amount; that he would like to sell her the stock and continue to carry it for her in the loan with Morgan & Co. Forbes told him he thought that could be done; but it would require a very carefully drawn agreement and petitioner told Forbes that was what he wanted his advice on. Petitioner told Forbes that usually his transactions with Mrs. Mitchell were handled by letters and,
105 instead of a formal agreement, letters were prepared by petitioner and Forbes as follows:

(a) A letter from petitioner to Mrs. Mitchell:

C. E. MITCHELL,
55 Wall Street, New York, December 20, 1929.

DEAR ELIZABETH: This is to confirm that I have today sold to you for your account and risk 18,300 shares of the capital stock of The National City Bank of New York, ex-January, 1930 dividend, at $212 per share, which represents the present market.

The stock is in the name of Taff & Co., and is represented by certificates as per the attached sheet. These shares are at present being carried in a loan with J. P. Morgan & Company for my account, and for your convenience I will arrange to so continue the carriage of the stock subject to your payment of the amount due, the debt in any event to be liquidated by you within nine months from date hereof.

Taff & Co. have been notified through The National City Company to remit to you the dividends received on the stock and I will, from time to time, render you a bill for the interest due on the loan. In acknowledging receipt hereof, please confirm your verbal instructions to me with respect to liquidation of the account and oblige.

Yours very truly,

[Signed] C. E. MITCHELL.

MRS. ELIZABETH R. MITCHELL,
934 Fifth Avenue, New York City.

106 (b) A letter from Mrs. Mitchell to petitioner:

934 FIFTH AVENUE,
New York, December 20, 1929.

MR. CHARLES E. MITCHELL,
55 Wall Street, New York.

DEAR CHARLES: I acknowledge receipt of your letter of December 20 and confirm purchase from you of 18,300 shares of the capital stock of The National City Bank of New York at $212 per share under the terms as stated in your letter.

You are hereby authorized to sell from time to time or at any time that may seem in your judgment proper all or any part of the said 18,300 shares at markets then prevailing but at not less than $220 per share, the avails over and above the purchase price to be remitted to me as received and to be applied on account of borrowings.

Yours very truly,

[Signed] ELIZABETH R. MITCHELL.

(c) A letter from petitioner to Taff & Co., in whose name the stock was held, to which was attached a list of the certificate numbers of the 18,300 shares of stock:

C. E. MITCHELL,
55 Wall Street, New York, December 20, 1929.

TAFF AND COMPANY,
% The National City Company,
52 Wall Street, New York City.

GENTLEMEN: The National City Bank shares in your name
107 (certificate numbers attached) are the property of Elizabeth

R. Mitchell, and dividends received by you on account thereof, subsequent to January 2, 1930, should be paid to E. Rend Mitchell, % E. F. Barrett, 55 Wall Street.

On the evening of December 20, 1929, petitioner signed the letter addressed to Mrs. Mitchell and she signed the letter addressed to him. Copies of these letters were thereafter delivered by petitioner to E. F. Barrett who, assisted by his secretary, Mrs. Kline, kept detailed records of Mrs. Mitchell's investment account. Petitioner also signed and delivered the letter to Taff & Co. On or about February 18, 1930, petitioner in his office handed to Lindsay Bradford, vice president of the City Bank Farmers Trust Co., the original letter from petitioner to Mrs. Mitchell, a copy of the letter from Mrs. Mitchell to petitioner and a copy of the letter from petitioner to Taff & Co. Mr. Bradford gave these papers to H. D. Sammis, vice president of the City Bank Farmers Trust Co., who placed them in a sealed envelope marked "Confidential a/c E. Rend Mitchell—Letters and papers re securities with J. P. Morgan & Co., envelope only to be opened on instructions from Mrs. Mitchell or E. F. Barrett, vice-president, National City Bank, or Lindsay Bradford, vice-president, City Bank Farmers, or H. D. Sammis, vice president,
City Bank Farmers." On February 18, 1930, the Trust Co.
108 gave Barrett a receipt covering this envelope. This envelope
was then placed in the vault of the trust company in which records of customers were kept. Forbes had told petitioner that, for Mrs. Mitchell's protection, he ought to notify Morgan & Co. of the sale and arrange with them for Mrs. Mitchell to withdraw the stock on the payment of $212 per share. Petitioner did not notify Morgan & Co. of the transaction of December 20, 1929, and copies of the letters were not shown to Morgan & Co., or any representative of that firm. In or about the month of January 1931, Morgan & Co. received for the first time knowledge or information to the effect that petitioner had, or claimed to have, sold said 18,300 shares of National City Bank stock.

15. Forbes told petitioner that revenue stamps would be required in the transaction. At the time the letters were exchanged no internal revenue or state transfer stamps were attached to them and no bill of sale was executed in connection with the transaction. Subsequently, on or about the 11th of August 1933, on demand of the collector of internal revenue, petitioner purchased internal revenue stamps in the amount of $116.46, which were affixed.

16. Mrs. Mitchell's ledger contains an entry entitled "National City Bank Stock" reading as follows: "1929—Dec. 20—Bought at 212—18,300 shares—$879,600" (*sic*). This figure was computed by Mrs. Kline from the copies of the letters of December 20, 1929, delivered
to her by Barrett for filing. In Mrs. Kline's handwriting
109 appear, in pencil, the words "See file on securities." No other
entries of any kind appear in Mrs. Mitchell's books concerning this transaction. On or about February 18, 1930, Mrs. Mitchell's

custodian account at the National City Co. was transferred to the City Bank Farmers Trust Co., which assumed the management of this account. The City Bank Farmers Trust Co. did not, however, assume the management of the 18,300 shares of National City Bank stock, which were treated differently from her other securities, and petitioner alone was the one to advise with respect thereto.

17. Mrs. Mitchell made no payment on account of the purchase price of the stock and gave no note or other evidence of indebtedness therefor.

18. Mrs. Mitchell's account with the City Bank Farmers Trust Co. was credited with dividends on 18,300 shares of National City Bank stock as follows:

April 1, 1930	$18,300	April 1, 1931	$18,300
July 1, 1930	18,300	July 1, 1931	18,300
October 1, 1930	18,300	October 1, 1931	18,300
January 2, 1931	18,300	January 2, 1932	18,300

The dividend rate on said National City Bank stock was $4 per share per annum, payable quarterly, and this was the dividend rate payable on that stock since April 1929. The fact of said dividend rate was published. On April 1, 1930, Mrs. Mitchell also received a dividend on the 500 shares of National City Bank stock owned by her prior to December 20, 1929. The dividend on the 500 shares was credited to Mrs. Mitchell's income account in the City Bank
110 Farmers Trust Co. and remained in that account. The dividend on the 18,300 shares was credited to Mrs. Mitchell's income account and immediately transferred to her principal account. Subsequent dividends on both the 500 shares and 18,300 shares were treated in the same manner, respectively.

19. During the period from December 20, 1929, to March 24, 1932, there were paid to petitioner from Mrs. Mitchell's account sums in the amounts and on the dates as follows:

April 1, 1930	$59,810.50	April 1, 1931	$48,495.00
July 1, 1930	49,033.84	July 1, 1931	49,033.84
October 1, 1930	49,572.67	October 2, 1931	49,576.67
January 2, 1931	49,572.67	January 2, 1932	49,572.50

Mrs. Mitchell made no payments to petitioner between December 20, 1929, and March 24, 1932, other than those above set forth. The payments thus made to petitioner exceeded by $258,267.69 the dividends credited to Mrs. Mitchell's account from the 18,300 shares of National City Bank stock.

20. The dividends from the 18,300 shares of National City Bank stock were not sufficient to meet the so-called "interest payments" from Mrs. Mitchell to petitioner. The first payment was made April 1, 1930. This payment in the amount of $59,810.50 was made out of Mrs. Mitchell's principal account in the City Bank Farmers Trust Co. and created an overdraft in that account of about $19,414.60. Two subsequent payments to petitioner, on July 1 and October 1, 1930, created overdraft in her principal account.

21. In order to enable Mrs. Mitchell to meet the interest pay-
111 ments to petitioner without depleting her personal fortune petitioner made various payments and gifts of cash or other property to her from time to time during the period from December 20, 1929, to December 31, 1932, as follows:

June 4, 1930, "as a wedding anniversary present" securities having a then market value of $42,500.

July 1, 1930, $25,000. This amount was entered in Mrs. Mitchell's books of account as "Proceeds of loan at 4%."

August 21, 1930, $22,500, given to Mrs. Mitchell on the occasion of her birthday.

January 21, 1931, $25,000, given to Mrs. Mitchell as a Christmas gift.

April 10, 1931, $30,000.

June 30, 1931, $25,000.

August 18, 1931, $5,000 deposited to Mrs. Mitchell's personal account.

August 18, 1931, $10,000, birthday gift.

October 6, 1931, $25,000, given to Mrs. Mitchell on the occasion of petitioner's birthday.

December 24, 1931, $1,000, deposited to Mrs. Mitchell's personal account.

December 25, 1931, $30,000, Christmas gift.

August 11, 1932, $5,000.

December 24, 1932, $1,000, deposited in Mrs. Mitchell's personal account.

22. On July 1, 1931, the Trust Co. wrote to petitioner as follows:

In compliance with your request we enclose a check drawn
112 to your order for $49,033.84 and have debited a like amount to Mrs. Mitchell's Investment Management Account.

23. In order to ascertain how his "gifts to Mrs. Mitchell had checked up" and "how much of a burden she had really been under as a result of this purchase" of 18,300 shares of bank stock, petitioner requested his secretary to get from the City Bank Farmers Trust Co. a statement of the receipts and disbursements. As a result of this request the following memorandum was prepared and given to the petitioner:

OCTOBER 2, 1931.

Re: Account E. Rend Mitchell

Receipts:

1931	
Jan. 2—National City Co	$18,300
Jan. 22—Recd. from Mr. Mitchell	25,000
Apr. 1—National City Co	18,300
" 10—Recd. from Mr. Mitchell	30,000
June 30— " " " "	25,000
July 1—National City Co	18,300
Aug. 18—Recd. from Mr. Mitchell	10,000
Oct. 2—National City Co	18,300
	163,200

Disbursements:	
Jan. 2—Paid Mr. Mitchell	$49,572.67
Apr. 2— " " "	48,495.00
July 1— " " "	49,033.84
Oct. 2— " " "	49,576.67
	$196,678.18

Difference due Mrs. Mitchell, $33,478.18.

H. M. PETERSON,
Asst. Trust Officer.

On October 6, 1931, petitioner gave Mrs. Mitchell the sum of $25,000 on the occasion of his birthday.

In 1932 petitioner requested his secretary to get from the City Bank Farmers Trust Co. a memorandum showing, from the
113 first of January, 1931, the amount of dividends received by Mrs. Mitchell; the total amount of gifts he had made to her; the amount of disbursements by her to petitioner and the amount of premiums paid by her on the life insurance policies. (In the years 1925 and 1926 the petitioner transferred to Mrs. Mitchell certain policies of insurance on his life and thereafter Mrs. Mitchell paid the premiums thereon.) On or about August 11, 1932, the following memorandum was furnished in compliance with petitioner's request:

AUGUST 11, 1932.

Re: Account E. Rend Mitchell

The figures given below include various receipts and disbursements for the above account—January 2, 1931 to date—including and supplemental to our memorandum of October 2, 1931.

Receipts:		
1931		
Jan. 2—National City Co	$18,300	
Jan. 22—Recd. from Mr. Mitchell	25,000	
Apr. 1—National City Co	18,300	
" 10—Recd. from Mr. Mitchell	30,000	
June 30— " " " "	25,000	
July 1—National City Co	18,300	
Aug. 18—Recd. from Mr. Mitchell	10,000	
Oct. 2—National City Co	18,300	
Oct. 6—Recd. from Mr. Mitchell	25,000	
Dec. 29— " " " "	30,000	
1932		
Jan. 2—National City Co	18,300	
		$236,500.00
1931		
Disbursements:		
Jan. 2—Paid Mr. Mitchell	$49,572.67	
April 2— " " "	48,495.00	
July 1— " " "	49,033.84	
Oct. 2— " " "	49,033.84	
1932		
Jan. 2— " " "	49,572.50	
		246,250.68
Difference		$9,750.68

H. M. PETERSON,
Asst. Trust Officer.

Premiums due to date	24,240.20
	$33,990.88
Premiums due August 16	3,399.00
Total disbursements	$37,389.88

114 On the same date, August 11, 1932, petitioner made gifts to Mrs. Mitchell in the amount of $10,000.

24. At the annual meeting of the stockholders of the National City Bank, in January, 1930, a stockholder asked petitioner whether he had disposed of any of his stock in the National City Bank. Petitioner replied, "Not a single share, sir. As a matter of fact I am buying all I can possibly get and that I can possibly pay for."

25. After December 20, 1929, the market price of National City Bank stock rose until on February 14, 1930, it reached 255 bid and 257 asked. Thereafter, the price declined until on March 24, 1932, it was 43¾ bid and 44¼ asked. None of the 18,300 shares here in question were sold at the higher price.

26. From time to time petitioner gave additional collateral to J. P. Morgan & Co. to secure the loan established by him on or about October 29, 1929, in connection with the purchase of National City Bank stock. This collateral included bonds and mortgages on real estate owned by petitioner. After December 20, 1929, the net worth of petitioner, which had approximated $30,000,000 in October, 1929, declined until in or about February, 1931, he advised Morgan & Co. that he had exhausted all his assets and was unable to furnish any further collateral. Thereafter petitioner's financial condition became progressively worse and on March 24, 1932, he was insolvent by an amount in excess of $3,000,000.

27. With the decline of the market in 1931 petitioner's loan
115 with Morgan & Co. became undermargined and by the summer of that year the collateral was worth less than the loan itself. Late in the summer of 1931 petitioner discussed this matter with Guy Cary, one of the senior partners of the firm of Shearman & Sterling, and sought to determine whether there was some basis for making a claim against the National City Co. and asking the company to relieve him from the situation in which he found himself as a result of the purchase of the 28,300 shares of National City Bank stock and the loan negotiated on account of that purchase. Cary suggested that petitioner seek the advice of independent counsel.

Petitioner thereon consulted the firm of Cravath, DeGersdorff, Swaine & Wood. As a result they wrote petitioner a letter dated March 5, 1932, in which the following paragraph appeared:

We are therefore of opinion that The National City Company is under obligation to take up from the Morgan loan the 18,300 shares of National City stock at their net present cost with adjustment for interest charged and dividends received.

The above letter recites the fact of the sale of 10,000 shares of National City Bank stock, but makes no mention of the sale of 18,300 shares to Mrs. Mitchell.

Petitioner forwarded this letter, under date of March 11, 1932, to Hugh Baker, president of the National City Co. Baker caused it to be presented to the board of directors of that company at a
116 meeting. Petitioner attended this meeting, but withdrew prior

to the presentation to the board of the letter and was not present when the matter was under consideration.

The matters referred to in the letter were the subject of conferences among the directors of the National City Co. and of the National City Bank, both before and after the submission of said letter to the directors of the National City Co., and petitioner attended certain conferences concerning his claim referred to in said letter. An informal committee of directors of the National City Bank and the National City Co. was appointed, to which petitioner's claim was referred. Petitioner discussed his claim with this committee but he did not inform the committee that he had sold the stock to Mrs. Mitchell. The committee secured the opinion of John W. Davis, a member of the New York Bar, to the effect that there was no legal basis for the claim. Thereafter, on June 29, 1932, petitioner wrote a letter to the president of the National City Co. in which he suggested that it "not be further considered now in the light of a claim" but await more favorable conditions in the affairs of the company.

28. In March 1932, petitioner was advised by Guy Cary, of the firm of Shearman & Sterling, who had some knowledge of petitioner's affairs, that a Federal gift tax was liable to be imposed by Congress which would further complicate petitioner's affairs in the event that he contemplated making a gift to Mrs. Mitchell by way of forgiveness of her debt to him. Thereafter, petitioner consulted his personal attorneys, Cravath, DeGersdorff, Swaine & Wood, and letters
117 were prepared by the attorneys and exchanged between petitioner and his wife as follows:

MARCH 24, 1932.

DEAR ELIZABETH: You now hold 18,300 shares of the capital stock of The National City Bank of New York, together with certain claims against The National City Company in connection therewith, in respect of which you are now indebted to me in the sum of $3,924,862.

This is to confirm my purchase from you of said shares and claims, in consideration of my releasing you of all liability on account of your present indebtedness to me in connection therewith.

Therefore, please sign and deliver to me the enclosed bill of sale of stock, with the necessary tax stamps attached, upon receipt of which I hereby release you from any further obligation whatsoever in connection therewith.

Please also sign and return to me the enclosed dividend order.

Very truly yours,

[Signed] C. E. MITCHELL.

MRS. C. E. MITCHELL,
934 Fifth Avenue, New York, New York.

MARCH 24, 1932.

DEAR CHARLES: I confirm the sale mentioned in your letter of today and send you herewith, signed and with transfer stamps at-

tached, bill of sale for 18,300 shares of stock of The National City Bank of New York.

118 The signed dividend order is also returned herewith.

Very truly yours,

[Signed] ELIZABETH R. MITCHELL.

Mr. CHARLES E. MITCHELL,
55 Wall Street, New York, New York.

Mrs. Mitchell also executed the following bill of sale, to which revenue stamps were attached:

NEW YORK, *March 24, 1932.*

Sold to Charles E. Mitchell eighteen thousand three hundred (18,300) shares of capital stock of The National City Bank of New York.

[Signed] ELIZABETH R. MITCHELL.

Mrs. Mitchell also signed the following letter to Taff & Co.:

MARCH 24, 1932.

Messrs. TEFFT & COMPANY [*sic*]
In Care of The National City Company,
20 Exchange Place, New York, New York.

DEAR SIRS: Please hereafter pay to Charles E. Mitchell, 55 Wall Street, New York City, any and all dividends received by you subsequent to the date hereof on account of The National City Bank shares in your name represented by certificates numbered as per attached list.

Very truly yours,

[Signed] ELIZABETH R. MITCHELL.

119 To this letter was attached a list of the numbers of the certificates and the number of shares evidenced by each certificate totaling the 18,300 shares of stock.

The price named as a basis of the above transaction between petitioner and his wife was $212 per share, the same price named at the time of the first transaction between the parties. At the date of the last transaction the market price on the stock was approximately $45 per share. Mrs. Mitchell never paid to petitioner any part of the purchase price of the 18,300 shares of stock, and no cash was passed between them in either the transaction of December 20, 1929, or that of March 24, 1932. At this later date petitioner was insolvent in amount of $3,000,000.

29. On March 25, 1932, the day following the exchange of letters between petitioner and his wife, petitioner sent the following letter to Lindsay Bradford, vice president of the City Bank Farmers Trust Co.:

MARCH 25, 1932.

Personal and Confidential

DEAR MR. BRADFORD: You may want to put into a sealed envelope, to be carried in Mrs. Mitchell's files, the enclosed papers having to

do with the passage of title of 18,300 shares of National City Bank stock and a release from debt thereon.

You will note that from this time on there will be no interest payments due from her or dividend entries.

120 A brief acknowledgment sent to me under confidential cover will be appreciated.

Yours very truly,

[Signed] C. E. MITCHELL.

Mr. LINDSAY BRADFORD, *Vice President*,
The City Bank Farmers Trust Company,
22 William Street, New York, New York.

The enclosures referred to in said letter were the original of petitioner's letter of March 24, 1932, to Mrs. Mitchell and a copy of Mrs. Mitchell's letter of that date to him.

This letter was acknowledged by Mr. Bradford as follows:

CITY BANK FARMERS TRUST COMPANY,
22 William Street, New York, March 25, 1932.

Personal and Confidential

DEAR MR. MITCHELL: This will acknowledge your letter of March 25, 1932, enclosing a certain letter from you to Mrs. Mitchell, together with other papers, all of them apropos of the transfer of title of 18,300 shares of National City Bank stock from Mrs. Mitchell to yourself.

We have made due note of the fact that previous arrangements in regard to interest payments and dividend receipts are no longer in force.

For your information, we have placed the papers which you
121 enclosed in a sealed envelope and placed the envelope in Mrs. Mitchell's files.

Yours very truly,

[Signed] LINDSAY BRADFORD,
Vice President.

Mr. CHARLES E. MITCHELL,
55 Wall Street, New York, New York.

30. On February 8, 1921, the board of directors of the National City Co. adopted a resolution providing for additional compensation to certain of its officers as provided in the minutes of the meeting on that date creating a "management fund." Certain changes were made therein by resolution of the board of directors on January 24, 1927, and the plan so modified was in effect during the year 1929.

The management fund plan provided that there be set up a reserve account out of current earnings. The term "current earnings" is defined as constituting the net operating income of the month, after current charges for depreciation or write-offs, taxes, or other reserves authorized by the board of directors. From the current earnings so determined there was first to be deducted each month an amount

figured at 8 percent per annum on the average quarter year aggregate of capital, surplus, and undivided profits. An amount equal to 20 percent of the remainder of such current earnings for the month was then credited to the management fund.

122 At the close of the current year or at any time, or from time to time during the year, the executive committee was empowered to make distribution of the management fund to operating executive officers of presidential or vice presidential rank, one half "in accordance with fixed percentages to be forthwith established," the remaining one half to be distributed to executives of similar class "holding office at the close of the year, in such proportion as in the unrestricted judgment and discretion of the committee may seem wise and proper as representing the ratable contribution of each such executive to the development and progress of the company during the year." An exception was made as to the president in order that the executive committee might have the benefit of his unbiased opinion and advice with respect to the distribution of the fund referred to in the foregoing sentence. The percentage of the participation of the president in the entire fund was to be fixed forthwith. Petitioner was president of the company at the time of both resolutions and did not become chairman until 1929.

31. Distributions from the management fund were made semi-annually as follows:

Date	Amount	Total	Date	Amount	Total
7/13/21	$196,351.55		7/1/26	$186,000.00	
12/22/21	400,000.00		1/5/27	508,000.00	
		$596,351.55			$694,000.00
7/5/21	375,000.00		7/1/27	540,000.00	
1/5/23	615,000.00		1/4/28	1,010,000.00	
		990,000.00			1,550,000.00
7/5/23	150,000.00		7/2/28	650,000.00	
1/8/24	116,000.00		1/3/29	1,450,000.00	
		266,000.00			2,100,000.00
7/8/24	175,000.00		7/1/29	1,860,000.00	1,860,000.00
1/7/25	785,142.92		1/2/31	140,938.98	140,938.98
		960,142.92			
7/6/25	305,000.00				
1/5/26	649,237.50				
		954,237.50			

123 32. At a meeting of the board of directors of the National City Co. held on January 2, 1929, the president reported that the figures with respect to the management fund and his recommendations for distribution thereof had been submitted to the executive committee and approved.

Thereafter on January 3, 1929, the National City Co. deposited $1,450,000 with the Bankers Trust Co. of New York for the account of the management fund, and a distribution of this sum was made as payments from the management fund. Of the amount so distributed petitioner received $483,333.33. After this distribution there remained in the management fund a balance of $140,938.98.

33. At a meeting of the board of directors of the National City Co. on January 8, 1929, the plan for the establishment of manage-

ment funds as set forth in the board's resolution of January 25, 1927, was reapproved and adopted for the year 1929, "in each and every respect including method of distribution thereof," and the officers were "authorized and instructed to set up monthly reserves therefor." On the same date there was a meeting of the executive committee of the National City Co. At these meetings the percentage allotment of the president in the management fund for the year 1929 was definitely determined and fixed at 33⅓ percent.

34. At a meeting of the board of directors of the National City Co., June 25, 1929, the chairman reported that the accumulation in
124 the management fund for the first six months of the year 1929 would aggregate approximately $2,900,000, whereupon a resolution was passed authorizing a distribution from the accumulation according to the fixed percentages and the treasurer was authorized, upon the approval of the chairman and/or H. F. Mayer, vice president, to make disbursements to the eligible officers on July 1, 1929.

On June 27, 1929, the chairman and vice president signed the following memorandum:

JUNE 27, 1929.

Mr. S. W. BALDWIN, *Treasurer:*

In accordance with the resolution passed by The Board of Directors at the meeting held June 25, 1929, will you please make disbursements from the Management Fund at this time, of the following amounts:

Mr. C. E. Mitchell	$666,666.67	Mr. G. S. Rentschler	$100,000.00
" H. B. Baker	220,000.00	" G. D. Buckley	73,333.33
" R. M. Byrnes	170,000.00	" J. P. Ripley	150,000.00
" G. K. Weeks	110,000.00	" W. R. Morrison	50,000.00
" P. V. Davis	80,000.00		
" L. E. Olwell	70,000.00	Total	1,860,000.00
" S. A. Russell	170,000.00		

C. E. MITCHELL, *Chairman.*
H. F. MAYER, *Vice President.*

125 Thereafter, On July 1, 1929, the National City Co. deposited $1,860,000 with the Bankers Trust Co. for the account of the management fund and a distribution of this sum was made from the management fund. The amount received by petitioner was $666,666.67.

35. In computing the amounts available for payments to the participants in the management fund, computations were made at the end of each month and credited to the account kept for that purpose, entitled "Reserve for other deductions," in those months in which there were accretions to the fund. In those months in which the company suffered losses this account was correspondingly reduced. Credits were made to this account during every month of 1929 through the month of October. For the months of November and December there were no credits to this account, and the losses of the National City Co. during the said months exceeded the profits which it made during the first ten months of the year.

36. Sometime about the latter part of November 1929, petitioner asked R. M. Byrnes, a vice president of the National City Co., to make a study of the management fund for presentation to the board.

On or about December 13, 1929, F. H. Mayer, vice president and comptroller of the National City Co., consulted Harry W. Forbes of the law firm of Shearman & Sterling. Forbes was familiar with the management fund only in a very general way and Mayer told him
126 of the payment that had been made in the middle of the year, but owing to subsequent losses it was apparent that it was going to result in an overpayment and that he thought he ought to have some sort of voucher from the officers who had received the money, acknowledging it. Certain officers objected to such a procedure.

Within a day or two thereafter Mayer called Forbes on the telephone and asked if he would get up a form of receipt which had been mentioned. Forbes told him that he would get up a receipt but would not attempt to pass on the effect of it. A form of receipt was drawn up by Forbes and transmitted to Mayer, December 13, 1929. Receipts in this form were signed by all of the participants in the distribution of the management fund of July 1, 1929. Petitioner signed a receipt in the following form:

Received on July 1, 1929, from the National City Company $666,666.67, which represents an overpayment to me of my share for the year 1929 in the Management Fund, and which is to be repaid by me from future additions to the said Management Fund, before I become entitled to any further payments therefrom.

C. E. MITCHELL.

These receipts were placed in an envelope marked "Accounts Receivable S. W. Baldwin, Treasurer, Special Management Fund 1929," which envelope remained thereafter in the vaults of the National City Co.

37. At a meeting of the board of directors of the National
127 City Co. held on December 30, 1929, petitioner, who was chairman of the board, discussed the management fund with particular reference to the distribution made of this fund July 1, 1929, and the status of the fund after the results of the whole year were taken into account. After discussion of the matter the following resolution was duly adopted:

Resolved that the share which each of the executives of this Company received in the distribution of the first half of the Management Fund for 1929 be debited against each of such officers respectively on the books of this Company to be repaid by each of them out of any distributive share of the Management Fund which each of such officers may be entitled to receive in any year subsequent to the current year 1929.

38. As of December 30, 1929, there was set up on the accounts receivable and payable ledger of the National City Co. a debit to "Accounts Receivable and Payable" and a credit to "Reserve for other Deductions" in the amount of $1,860,000. This entry was carried forward to the year 1930.

39. At a meeting of the board of directors of the National City Co. January 9, 1930, the chairman discussed the management fund for 1930 and the following resolutions were passed:

Resolved that the basis of division as between the executive officers with reference to the first half of the fund during 1929 be con-
128 tinued during 1930 as to those officers receiving advances from management funds in July 1929, and until rescinded and revised by this Board. Further

Resolved that after the distribution made among the executive officers in July 1929, has been repaid to the Company out of the Management Fund accumulated and distributed subsequent to December 31, 1929, the Board again consider the Management Fund in all its phases and reestablish the basis for future distributions as at such time seems just and equitable.

Thereafter, on or about January 18, 1930, petitioner sent a letter to each of the participants in the management fund distribution of July 1, 1929. This letter was in part as follows:

The events of the last quarter year have wiped out the accumulation of the management fund, and accordingly you have been debited on the books with the amount advanced to you in July, and this debit will stand until it can be paid from distribution to you of future accumulations in management fund.

40. Prior to March 15, 1930, petitioner received the following memorandum from the National City Co., which he gave to Sweeney, his secretary, to be handed to F. W. Black, who was preparing petitioner's Federal income tax return:

Confidential Memorandum for Mr. Mitchell

We will report to the Commissioner of Internal Revenue,
129 Washington, D. C., and to the New York State Income Tax Bureau, Albany, New York, that compensation in the amount of $510,629.28 was paid to you by this company during the year 1929. This is in compliance with the Income Tax Laws.

This memorandum was handed by Sweeney to Black.

The National City Co., on its Federal income tax return for the calendar year 1929 did not deduct any part of the management fund distributed July 1, 1929, as compensation to its officers or otherwise. Without the benefit of such deduction the Federal income tax return of the National City Co. for 1929 showed a net loss of several million dollars in excess of $1,860,000, the amount distributed July 1, 1929.

41. In January 1930, after the meeting of the board of directors of the National City Co. on December 30, 1929, Gerrard Winston, a director, and a member of the law firm of Shearman & Sterling, consulted Forbes of the same firm, concerning the matter of the 1929 midyear distribution from the management fund from the tax standpoint of the National City Co. A few days later Winston saw petitioner and stated to him that he and Forbes had come to the conclu-

sion that the midyear payment made out of the management fund was, as a result of the action of the board at its December 30 meeting not a proper deduction for the National City Co. to take from its income tax return; that the company should not report those payments as compensation to officers; and that it followed, from
130 the fact that it was not a deduction from the company income, it was not income to the petitioner.

42. At the meeting of the board of directors of the National City Co. on December 30, 1930, the following resolution was adopted:

Resolved, That the undistributed part of the Management Fund for the year 1928, amounting to $140,938.98, shall be distributed not later than January 2, 1931, to such officers as were eligible for participation at the close of the year 1928 and are still in the employ of the Company, and distribution thereof to individual officers shall be in the same proportion as the balance of such 1928 fund was distributed and the share of any officer not now eligible shall be also distributed in such proportion, as may be determined by a special committee consisting of Messrs. Swenson, Winthrop, and Winston;

Further Resolved, That the payments made to eligible officers out of the Management Fund accruals in July 1929 shall continue to be considered as advances made from an expected accrual in Management Fund for the year 1929 which failed to materialize and that amounts so advanced will be continued as "debts owing" by the officers to whom such advances were made, payable only, however, from amounts which may be distributed to such officers from future accruals in Management Fund account, and

Further Resolved, That the Chairman is authorized to advise the officers of the foregoing, and to give assurance that, as early
131 as may be found convenient in January 1931, this Board will adopt resolutions pertaining to the Management Fund for the year 1931, that in their judgment will be fair and of a reassuring character.

Thereafter, on or before January 2, 1931, payments aggregating $140,938.98 were made from the management fund out of the account known as "Reserve for Other Deductions," this sum being the balance left in this account in January 1929 after all distributions had been made. The payments were made as follows:

Mitchell	$50,515.53	Rentschler	$12,123.56
Baker	16,670.41	Buckley	6,061.78
Byrnes	15,154.46	Ripley	7,577.77
Davis	6,061.78	Seboepperle	3,030.89
Olwell	5,556.47	Sylvester	4,546.82
Russell	13,639.51		
			140,938.98

No part of this distribution was applied against the payments made from the management fund July 1, 1929, and the share of G. K. Weeks, who had participated in the distribution of July 1, 1929, to the extent of $110,000 but was no longer connected with the company, was split up among the other officers.

43. At a meeting on January 9, 1931, the board of directors of the National City Co. adopted a resolution approving a balance sheet of the National City Co. as of December 31, 1930, which, according to the minutes of the meeting, shows, among other things, "reserves aggregating $10,256,072.28 set up against accounts and notes receivable which, based upon the study of the individual items rep-
132 resented, in the opinion of Vice President Mayer and the comptroller of the company, is sufficient to make the net figure a collectible amount." These reserves included the sum of $1,859,999, this figure being the amount ($1,860,000) distributed from the management fund on July 1, 1929, less $1. No investigation was made of the ability to pay of the officers to whom the distribution of July 1, 1929, had been made, and it was known that at the time of the meeting some of them had assets in substantial amounts.

44. At a meeting of the board of directors of the National City Co. December 28, 1931, the following resolution was passed:

Whereas this Company now holds the receipt of Mr. J. P. Ripley reading as follows:

"Received on July 1, 1929, from The National City Company $150,000, which represents an overpayment to me of my share for the year 1929 in the Management Fund and which is to be repaid by me from future additions to the said Management Fund before I become entitled to any further payments therefrom.

(Signed) J. P. RIPLEY."

and

Whereas it is desirable to recognize the special services performed by J. P. Ripley during the current year in connection with the reorganizations in which The National City Company was interested;

Now, therefore, be it resolved that, in recognition of such special services and in addition to his regular compensation, this
133 Company does release J. P. Ripley from any further obligation to repay to the Company, out of any future additions to the Management Fund to which he might become entitled, the amount specified in the foregoing receipt, and do cancel and return said receipt to J. P. Ripley.

Thereafter on December 31, 1931, on the books of the National City Co. accounts receivable ("Treasurer's Account Special") was credited, and "Surplus and Reserves" was debited in the sum of $150,000, the amount of Joseph Ripley's participation in the management fund distribution of July 1, 1929, thus reducing the "Treasurer's Account Special" as shown on the books, from $1,860,000 to $1,710,000. Adjustments were made on the books of the National City Co., "Supplementary as of December 31, 1931", to reduce the reserve set up on account of the management fund payments from $1,859,999 to $1,709,999.

45. At a meeting of the board of directors of the National City Co., October 10, 1932, the petitioner presented the following resolution:

Whereas, Lee E. Olwell, formerly Vice President of this Company, has resigned and he is indebted to this Company for loans and advances made to him to the extent of $393,111.65, plus interest from July 1, 1932, which indebtedness is now carried on the books of the Company at $212,500 and is secured by certain collateral of a present market value of about $75,000; and

134 Whereas, it is believed that if this indebtedness be reduced to $200,000 and interest is fixed at 3%, Mr. Olwell, in his new employment will be able to meet the interest payments and ultimately to pay the $200,000 principal of his indebtedness to this Company;

Now, therefore, be it resolved that this Company reduce the value on its books of Mr. Olwell's indebtedness to $200,000, cancel all of said indebtedness in excess of said sum and receive from Mr. Olwell his note for $200,000 payable on or before two years from October 1, 1932, with interest at 3% per annum payable quarterly and secured by the same collateral as is now held as security for his existing indebtedness.

The indebtedness of Lee E. Olwell, vice president of the National City Co., referred to above, represented moneys borrowed from the company and did not include $70,000 received by Olwell from the distribution from the management fund made in July 1929. Olwell withdrew from the National City Co. in 1932, and was not in its employ October 10, 1932.

46. At a meeting of the board of directors of the National City Co., December 27, 1932, at which petitioner presided, the following resolution was passed:

Resolved, that the reserve of $1,709,999 now standing against an equal amount of Accounts Receivable on the books of the

135 Company, representing obligations to the Company from participants in the Management Fund in 1929, be applied against such Accounts Receivable and that the obligations of participants in the Management Fund in 1929 be carried on the books of the Company at $1.00, without, however, in any respect releasing these participants from their obligations to the Company.

Adjustments were made on the books of the National City Co. in conformity with this resolution, and the "Reserve for Doubtful Accounts" was charged with $1 to close the "Treasurer's Account Special."

On December 30, 1932, after the "Treasurer's Account Special" had been written down to $1 and closed out of "Accounts Receivable and Payable," entries were made by Frank W. McGuire, assistant secretary of the National City Co., on a loose leaf memorandum book, as follows:

Accounts Receivable—Management Fund 1929

Date	Name	Dr.	Cr.	Balance
July 1929	C. E. Mitchell	$666,666.67		
	H. B. Baker	220,000.00		
	G. S. Rentschler	100,000.00		
	G. D. Buckley	73,333.33		
	R. M. Byrnes	170,000.00		
	P. V. Davis	80,000.00		
	L. E. Olwell	70,000.00		
	Jos. P. Ripley	150,000.00		
	S. A. Russell	170,000.00		
	W. R. Morrison	50,000.00		
	G. K. Weeks	110,000.00		$1,860,000.00
Dec. 28, 1931	Resolution by Board of Directors for Special Services of Jos. P. Ripley, he is released from the obligation and the receipt returned to him		$150,000.00	1,710,000.00
Dec. 27, 1932	Resolution by Board of Directors to establish these accounts at one dollar, without releasing in any way, the participants from their obligations to the Company Amount written down		1,709,999.00	1.00

136 All of the above entries were made at the same time, aside from the receipts given by those who participated in the distribution, July 1, 1929, of the management fund. This was the only break-down in the books and accounts of the National City Co. showing the items included in the "S. W. Baldwin Treasurer Special Account," or the names of the individuals involved.

47. From 1921 to 1930, inclusive, petitioner received a salary of $25,000 per annum from the National City Co. His salary from this company up to that time never exceeded $25,000 per annum.

At a meeting of the board of directors of the National City Co. held on June 22, 1931, petitioner's salary was raised to $75,000 per annum.

Other officers, besides petitioner, who had participated in the distribution of the management fund July 1, 1929, received increases in salaries.

48. During the year 1930 petitioner received a payment from the management fund of the National City Bank in the amount of $383,000.

During the years from 1929 to 1933 inclusive, petitioner received the following sums from the National City Co.:

Year	Salary	Management fund
1929	$25,000	$1,150,000.00
1930	25,000	0.00
1931	75,000	50,515.33
1932	75,000	0.00
1933 for two months—Same rate		0.00

137 Subsequent to the year 1929 there were no further accumulations to the management fund of the National City Co. and no distribution was made from such fund except the sum of $140,938.98, which sum remained in the management fund

after the payment of the distribution made in January 1929. No portion of the distribution of $140,938.98 was applied against the payments made in July 1929, from the management fund. The National City Co. never demanded or received of, or from, any of the parties who received payments from the management fund distribution made in July 1929, any part of that distribution, except that action was taken in regard to Joseph P. Ripley as set forth in the minutes of December 31, 1931, and that on December 10, 1933, Gordon Rentschler voluntarily paid to the National City Co. $100,000, the amount which he had received from the distribution of July 1929. No payment has been made by petitioner to the National City Co. of any part of the sum received by him from the July 1, 1929, management fund distribution.

49. With petitioner's knowledge and consent, F. W. Black, in preparing petitioner's Federal income tax return for the calendar year 1929, did not include the item of $666,666.67 which appeared in petitioner's books as having been received by petitioner from the management fund of the National City Co. on or about July 1, 1929.

50. Petitioner filed a false and fraudulent tax return for the year 1929 with intent to evade tax. The deficiency in tax, or part of it, is due to fraud with intent to evade tax.

51. On December 24, 1930, and prior thereto, petitioner was
138 one of the directors of the Anaconda Copper Mining Co. John D. Ryan was chairman of the board of directors of the same company and had been a friend of petitioner for many years. Ryan was also a member of the board of directors of the National City Bank.

52. On December 24, 1930, petitioner owned 10,000 shares of Anaconda stock, which he had acquired between January 15, 1929, and June 18, 1929, at a cost of $1,163,104.38, or $116.31 per share. The market price of this stock in December 1930 was slightly less than $30 per share.

53. William D. Thornton in December 1930 was president of the Green Cananea Copper Co., a subsidiary of the Anaconda Copper Mining Co. Mr. Thornton was a friend and business associate for thirty years of John D. Ryan, and had known petitioner for some years.

54. In December 1930, petitioner determined to sell 8,500 shares of Anaconda stock because he had a substantial income that would be wiped out by "the registration of the loss" incident to the sale of such shares in that year. On or about December 20, 1930, petitioner saw John D. Ryan and discussed the matter with him. Ryan was disturbed because petitioner proposed to sell the stock in the open market and asked petitioner if he would be willing to sell the stock to a private buyer if he (Ryan) could find one for him. Petitioner told him he thought he would.

55. On December 24, petitioner consulted Forbes, of Shear-
139 man & Sterling, as to whether or not a sale of an active listed stock to a private individual rather than on the market would

affect adversely the establishing of a loss for income tax purposes. Forbes advised him that a loss could be established by a private sale if an actual sale were made before the end of the year.

While Forbes was in his office, petitioner called Ryan on the telephone and was informed by Ryan that W. D. Thornton would buy his stock.

56. About noon of December 24, 1930, Ryan came to petitioner's office and told him that Thornton would want to borrow some money to pay for the stock and inquired if the National City Bank would lend him the money on the security of the 8,500 shares of Anaconda and additional shares of the same stock which he was prepared to put up. Petitioner declined to make the loan because of his personal connection with it and agreed to ask J. P. Morgan & Co. to make the loan.

Following this conversation with Ryan, petitioner telephoned to George Whitney of J. P. Morgan & Co. concerning a loan to Thornton from J. P. Morgan & Co. of $229,500, to be secured by 11,000 shares of Anaconda Copper Mining stock as collateral. Whitney agreed to make the loan and on December 26, 1930, petitioner wrote the following letter to Whitney, in longhand:

12/26.

DEAR GEORGE: This is as arranged with you on Wed.
140 Thornton will send you signed loan agreement and 2,500 sh additional probably today but certainly not later than Monday.
Yours,

(Signed) C. E. M.

57. On December 26, 1930, petitioner also wrote to J. P. Morgan & Co. as follows:

DECEMBER 26, 1930.

J. P. MORGAN & COMPANY,
23 Wall Street, New York City.

GENTLEMEN: I have sold to and will ask you to deliver from collateral in my loan with you 8,500 shares of stock of Anaconda Copper Mining Company to Mr. William D. Thornton, 25 Broadway, New York City, upon payment by him of $229,500, which amount, less stock transfer tax, please apply to the reduction of my loan.

Advice that this transaction has been completed will be appreciated.

Very truly yours,

(Signed) C. E. MITCHELL.

On the same day petitioner wrote to Ryan as follows:

DECEMBER 26, 1930.

Mr. JOHN D. RYAN,
25 Broadway, New York City.

DEAR JOHN: Pursuant to our conversation of Wednesday, I
141 enclose a copy of a letter which I have addressed and delivered to J. P. Morgan & Company today. Also a draft of a letter for Mr. Thornton to send to J. P. Morgan & Company. Will you be

so good to see that Mr. Thornton writes and signs this letter, and that it is sent with the loan contract agreement and the additional stock to J. P. Morgan & Company not later than next Monday.

I appreciate very much indeed your own auspices in this matter.

Very truly yours,

(Signed) CHARLES.

The enclosure referred to in petitioner's letter to Ryan was the letter to J. P. Morgan & Co., set out above, and the following draft of a letter to be written by Thornton to J. P. Morgan & Co.:

Draft

DECEMBER 26, 1930.

J. P. MORGAN & COMPANY
23 Wall Street, New York City.

Attention Mr. George Whitney

GENTLEMEN: I have purchased from Mr. C. E. Mitchell, 55 Wall Street, 8,500 shares stock of Anaconda Copper Mining Com-
142 pany and am advised that delivery will be made through you.

In accordance with oral arrangements please accept delivery for my account, making payment therefor in the amount of $229,500. I hand you herewith 2,500 shares of Anaconda Copper Mining Company stock which, with the 8,500 shares covered by the first mentioned transaction, making a total of 11,000 shares, please place as collateral to the enclosed loan contract agreement.

I would appreciate receiving word from you that the aforesaid transaction has been completed.

Very truly yours,

This draft was delivered by Ryan to Walter P. Adams, the accountant for both Thornton and Ryan, who caused a copy of it to be made, signed by Thornton and sent to J. P. Morgan & Co.

58. On December 26, 1930, the 2,500 shares of Anaconda Copper Mining stock referred to in petitioner's letter to Whitney of December 26 (set out above) and in the letter signed by Thornton and sent to J. P. Morgan & Co. (draft set out above) were sent to J. P. Morgan & Co. as additonal collateral for Thornton's demand loan of $229,500. Said 2,500 shares were the property of John D. Ryan and stood in the name of Hornblower & Weeks and were endorsed in blank.

59. The rate of interest charged by J. P. Morgan & Co. on this loan was 5 percent per annum. In December 1930, Thornton had
143 collateral loans with two banks. During the latter part of 1929 and the early part of 1930 the interest rate on these loans had been 6 percent and was thereafter reduced to 5½ percent, 5 percent, and finally on June 20, 1930, and June 27, 1930, to 4½ percent, which rate continued in effect through 1930. Prior to December 26,

1930, Thornton, individually, had never had any business with J. P. Morgan & Co.

60. Thornton had 17,000 shares of free Anaconda stock at Hornblower & Weeks and up to the time Ryan talked to him concerning the purchase of the 8,500 shares from petitioner he never thought of buying an additional large block of Anaconda. When Ryan suggested that he buy the Anaconda stock he immediately agreed.

All the arrangements for the transaction were made with Thornton by Ryan. Petitioner did not see Thornton nor talk with him about the transaction in any way.

61. On December 26, 1930, J. P. Morgan & Co. wrote to Thornton as follows:

DECEMBER 26, 1930.

W. D. THORNTON, ESQ.,
25 Broadway, New York, N. Y.

DEAR SIR: We have today received for your account, from Mr. C. E. Mitchell, 8,500 shares of Anaconda Copper Mining Company stock against payment of $229,500.

114 To cover cost of the above-mentioned stock we have today made you a demand loan for $229,500, with interest at 5 percent and will hold the stock as collateral together with 2,500 shares of Anaconda Copper Mining Company stock received from you today.

Kindly advise us in what name you wish the 8,500 shares of Anaconda Copper Mining Company stock registered.

Your very truly,

On the same date J. P. Morgan & Co. acknowledged receipt of petitioner's letter, advising him of the delivery of the 8,500 shares of Anaconda stock to Thornton and that they had used the $229,500, received from Thornton by paying $170 for stock transfer stamps and applying the balance of $229,330 as a credit upon petitioner's demand loan.

62. The Thornton loan with the collateral of 11,000 shares of Anaconda stock, was set up on the books of account of J. P. Morgan & Co. On December 29, 1930, Thornton replied to the letter of J. P. Morgan & Co. of December 26, 1930, and asked that the 8,500 shares of Anaconda stock be registered in the name of Morgan's nominee. Thereupon J. P. Morgan & Co. had the 8,500 shares transferred to the name of their nominee, "C. S. Hawkins," and endorsed in blank by him.

63. In the latter part of January or the early part of February 1931 Ryan and Thornton left for California and did not return until the end of April 1931.

145 64. On February 16, 1931, J. P. Morgan & Co. received $5,312.50, representing a quarterly dividend of 62½ cents per share on the 8,500 shares of Anaconda Copper Mining Co. stock,

which was applied on account of the principal of Thornton's demand loan. Morgan & Co. wrote to Thornton as follows:

FEBRUARY 16, 1931.

W. D. THORNTON, ESQ.,
25 Broadway, New York City.

DEAR SIR: We have today received check for $5,312.50 representing dividend on 8,500 shares Anaconda Copper Mining Company stock which we hold as part collateral to your demand loan dated December 26, 1930.

As instructed we have applied the above mentioned check on account of the principal of your demand loan.

Yours very truly,

The same dividend on 2,500 shares of Anaconda Copper Mining Co. stock held by J. P. Morgan & Co. as collateral on Thornton's loan, but still registered in the name of Hornblower & Weeks, was received by Hornblower & Weeks and credited to the account of John D. Ryan. Ryan was advised by Hornblower & Weeks of this credit. On April 23, 1931, he advised Hornblower & Weeks to credit the quarterly dividend on his 2,500 shares of Anaconda stock, payable on May 18, 1931, to his account.

146 65. On March 28, 1931, J. P. Morgan & Co. was requested to increase the principal of the loan by the amount of the interest due. On March 31, 1931, J. P. Morgan & Co., wrote to Thornton that they had so increased the principal of his loan by $2,996.40 in lieu of payment of the interest.

66. During the period between December 26, 1930, and May 4, 1931, the market price of Anaconda stock on the New York Stock Exchange had a price range of 25⅞ as the low and 43¼ as the high, the high point being reached on February 27, 1931, and the low point on May 4, 1931. At no time after December 26, 1930, and prior to May 1, 1931, did the stock sell as low as 27, which was the price of the stock to Thornton.

Sometime prior to April 28, 1931, when Anaconda stock went up, Thorton discussed the matter of a sale with Ryan. He told Ryan he had a handsome profit, about $100,000 on the 8,500 shares, and suggested it would be a good time to take it. Ryan advised him not to sell at that time. About April 30, 1931, when Thornton returned to New York, he suggested to Ryan that the stock ought to be sold. It was agreed that the stock would be sent over to Hornblower & Weeks to be sold under Ryan's instructions. Thornton understood before Hornblower & Weeks sold the stock that petitioner wanted to repurchase it.

67. Shortly after Ryan returned to New York from California, in the latter part of April, Ryan talked with petitioner about
147 bringing his Anaconda holdings up to his original 10,000 shares, calling his attention to the fact that the market had receded to a point very close to that at which petitioner had sold

the 8,500 shares, and offering to furnish Anaconda stock for such additional collateral as might be necessary in making a loan for that purpose.

When petitioner expressed apprehension that his order would put the market up against him unless he might be sure that the stock was there to meet the order, it was arranged that he would put the order through Hornblower & Weeks, and Ryan would have the stock there to meet the order. Petitioner had never had businss transactions with Hornblower & Weeks.

68. On May 4, 1931, Thornton signed the following letter to J. P. Morgan & Co.:

MAY 4TH, 1931.

MESSRS. J. P. MORGAN & Co.,
23 Wall Street, New York City.

DEAR SIRS: Will you please deliver to Messrs. Hornblower & Weeks, 42 Broadway, New York City, for my account eleven thousand (11,000) shares of Anaconda Copper Mining Company stock which you are holding as collateral security for my loan, and receive from them $228,256.71, principal and interest due on my note.

Thanking you, I am

Very truly yours,

(Signed) W. D. THORNTON.

148 On the same day Thornton signed a letter to Hornblower & Weeks asking them to pay the sum of $228,256.71 to J. P. Morgan & Co., and to accept the 11,000 shares of Anaconda stock for his account. Both letters were prepared by Adams. Ryan told Thornton petitioner wanted to buy the stock back.

69. On May 4, 1931, J. P. Morgan & Co. delivered the 11,000 shares to Hornblower & Weeks, and received from Hornblower & Weeks the amount of Thornton's debit balance to J. P. Morgan & Co., in the sum of $228,256.71, which amount was charged to Thornton's account by Hornblower & Weeks. Certificates representing 2,500 of these shares were the same certificates which had been delivered to J. P. Morgan & Co., as part of the collateral for Thornton's loan, and such shares on May 4, 1931, were still the property of Ryan.

70. On May 4, 1931, Ryan placed an order with Hornblower & Weeks to purchase 8,500 shares of Anaconda stock for an account to be opened with Hornblower & Weeks for the petitioner and at the same time to sell 8,500 shares of Anaconda stock for Thornton's account. Ryan and Thornton transacted most of their brokerage business through that firm.

Both orders were executed on the floor of the New York Stock Exchange on May 4, 1931, at 26⅝. The transaction was handled in accordance with the rules of the New York Stock Exchange, which required that cross orders be executed by offering the stock for sale on the market at one eighth of a point higher than

149 the existing market price before such sale could be consummated at the market price. Such offers were public offers and might be accepted by any member of the Exchange under the rules of the New York Stock Exchange then in force. The sale of 8,500 shares of Anaconda stock at 26⅝ was recorded on the ticker tape which reported transactions on the Exchange on said date.

71. On May 6, 1931, Hornblower & Weeks tendered delivery to petitioner of 11,000 shares of Anaconda stock to be taken up against the payment of the purchase price of 8,500 shares, aggregating $227,587.50. Petitioner advised Hornblower & Weeks that he did not have the money ready on that day to take up the stock, but that he would take it up the following day. The stock was thereupon returned to Hornblower & Weeks.

72. On May 6, 1931, petitioner arranged with the Guaranty Trust Co. for a loan of $200,000 against suitable collateral, and wrote the Guaranty Trust Co. as follows:

MAY 6, 1931.

GUARANTY TRUST COMPANY,
140 Broadway, New York City.

Attention—Mr. W. P. Conway, Vice President

GENTLEMEN: Pursuant to our telephone conversation today, there will be delivered to you for my account tomorrow 11,000 shares
150 Anaconda Copper Mining Company stock by Hornblower & Weeks, against which delivery please pay them $200,000, carrying said amount in loan for me.

Yours, very truly,

(Signed) C. E. MITCHELL.

The same day petitioner signed a loan application, in the usual form of the Guaranty Trust Co., as follows:

NEW YORK, *May 6, 1931.*

GUARANTY TRUST COMPANY OF NEW YORK:

Please loan the undersigned jointly and severally under the terms of agreement dated _____ on file with you, $200,000 payable demand with interest at 4 per cent secured by the following collateral:

Eleven thousand (11,000) shares Anaconda Copper Mining Co. stock.

(Signed) C. E. MITCHELL.

Petitioner also signed a power of attorney for the collateral.

On the same date he also wrote to Hornblower & Weeks as follows:

MAY 6, 1931.

HORNBLOWER AND WEEKS,
42 Broadway, New York City.

GENTLEMEN: Please deliver tomorrow, Thursday, to the Guaranty Trust Company for my account 11,000 shares of Anaconda Copper Mining Company stock against payment of $200,000.

151 In addition to the above, I am enclosing my check to your order for $27,628.60, which represents payment of balance of my account.

Yours, very truly,

(Signed) C. E. MITCHELL.

With this letter petitioner enclosed his check for $27,628.60 to the order of Hornblower & Weeks. This sum represented the difference between $200,000 and the purchase price of the 8,500 shares of Anaconda stock.

73. In accordance with the petitioner's instructions of May 6, 1931, Hornblower & Weeks delivered 8,500 shares of Anaconda Copper Mining Co. stock, together with the 2,500 shares of Anaconda stock which were the property of John D. Ryan, to the Guaranty Trust Co. on May 7, 1931. The certificates for 2,500 shares so delivered to the Guaranty Trust Co. by Hornblower & Weeks were the same certificates that had been received by Hornblower & Weeks from J. P. Morgan & Co. for Thornton's account. The certificates for 8,500 shares so delivered were not the same certificates that had been received by Hornblower & Weeks from J. P. Morgan & Co.

74. On May 7, 1931, the Guaranty Trust Co., advised petitioner that it had received from Hornblower & Weeks 11,000 shares of Anaconda stock against the payment by it of $200,000, and on the same day Hornblower & Weeks advised petitioner of that delivery against $200,000, and acknowledged receipt of petitioner's check for
152 $27,628.60, being the balance of the total purchase price of the 8,500 shares plus $41.10 interest.

75. On May 7, 1931, petitioner wrote the following letter to John D. Ryan:

MAY 7, 1931.

DEAR JOHN: This is to thank you sincerely for your loan to me of 2,500 shares of Anaconda Copper Mining Company stock, which was delivered by Hornblower and Weeks today, together with the 8,500 shares of stock which was purchased by them for my account. Your stock is, of course, loaned to me to be returned on your demand.

Yours very truly,

[Signed] C. E. MITCHELL.

At the bottom of this letter appears the following notation in the handwriting of Ryan:

This refers to a loan of 2500 Anaconda to C. E. M. without payment or consideration of any kind.

MAY 8/31 J. D. R.

76. On May 18, 1931, J. P. Morgan & Co. sent to Thornton their check for $3,187.50 covering a dividend of 37½ cents a share on 8,500 shares of Anaconda stock, which dividend had been declared
153 prior to May 4, 1931, and was not payable until May 18, 1931.

On May 22, 1931, Thornton enclosed in a letter to Hornblower & Weeks his check for $3,415.02, the balance due on the account.

77. Prior to May 18, 1931, Adams accountant for Thornton and Ryan, prepared a memorandum which was handed to petitioner by Ryan. This memorandum shows the gain or loss occasioned by the transaction and is as follows:

J. P. Morgan & Co. Loan:		
8,500 Anaconda bought at 27		$229,500.00
Feb. 16th dividend		5,312.50
Mch. 31st interest		2,996.40
May 4th "		1,072.81
Total		228,256.71
Hornblower & Weeks W. D. Thornton a/c:		
8,500 shares recd for		228,256.71
8,500 " sold at 26⅝	$226,312.50	
Stamps—commission	1,445.00	
		224,867.50
W. D. T. loss		3,389.21
Dividend on 8,500 Anaconda to be received May 18th, 1931 at 37½		3,187.50
W. D. T. Loss		207.71

This memorandum was handed to petitioner by Ryan, and petitioner turned the same over to F. W. Black, who prepared petitioner's income tax returns. The memorandum remained in Black's possession.

78. In Thornton's Federal income tax return for the calendar year 1931, which return was prepared by Adams, Thornton reported a purchase of 8,500 shares of Anaconda stock on December 26, 1930, and a sale of 8,500 shares of Anaconda stock on May 4, 1931, resulting in a loss on the transaction in the amount of $201.71, after
154 taking into account interest paid and dividends received.

79. In the calendar year 1930, dividends of $73,200 were paid on the 18,300 shares of National City Bank stock registered in the name of Taff & Co., and held by J. P. Morgan & Co., as collateral for petitioner's loan account. In his 1930 Federal income tax return petitioner reported $18,300 of this sum, being the dividend declared December 3, 1929, and payable January 1, 1930, to stockholders of record on December 7, 1929, and in her return for the calendar year 1930, Elizabeth R. Mitchell reported the balance of $54,900, as dividends received from 18,300 shares of National City Bank stock. For the same year Mrs. Mitchell deducted as interest paid to petitioner during said year the sum of $158,417.01. Petitioner did not report the item of $54,900 as dividends received in his return for 1930.

80. For the calendar year 1931, Mrs. Mitchell reported on her individual tax return the sum of $73,200, as dividends received from 18,300 shares of National City Bank stock. For the same year Mrs. Mitchell deducted as interest paid to petitioner during the year the sum of $196,678.18.

81. Petitioner filed a false and fraudulent return for the year 1930, with intent to evade tax. The deficiency in tax, or part of it, is due to fraud with intent to evade tax.

82. On April 25, 1933, an indictment was returned against
155 petitioner by a grand jury of the District Court of the United

States for the Southern District of New York. The indictment contained two counts. The first count charged that petitioner "unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to-wit, $728,709.84, upon his net income for 1929." The second count charged that petitioner "unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to-wit, $121,719.84, upon his net income for the calendar year 1930." To both counts in that indictment petitioner entered a plea of not guilty.

The item of $728,709.84, set out in the first count of said indictment and the item of $121,719.84, set out in the second count are identical with the deficiencies asserted by the Commissioner for the years 1929 and 1930, and claimed by the respondent in this proceeding, but do not include the 50 percent penalty asserted here. Said items and deficiencies arose from the same transactions of petitioner, i. e., for 1929, the deduction of $2,872,305.50, as a loss sustained upon the sale on December 20, 1929, of 18,300 shares of the stock of the National City Bank to his wife, Elizabeth R. Mitchell, and the failure to include in his income for 1929 the sum of $666,666.67, received by petitioner from the management fund of the National City Co., on July 1, 1929; for 1930, the deduction by petitioner of the sum of $758,918.25, as a loss from the sale of 8,500 shares of Anaconda Copper Mining Co. stock to W. D. Thornton, and the failure of petitioner to include in income for 1930, $54,900, representing dividends upon 18,300 shares of National City Bank stock.

156 83. Thereafter, petitioner was tried upon the charges contained in the said indictment before Judge Henry W. Goddard and a trial jury in the said United States District Court, the trial commencing May 11, 1933, and terminating on June 22, 1933.

84. On June 22, 1933, a verdict of not guilty was returned by the jury on all counts of the indictment.

OPINION

VAN FOSSAN: In this case the Government charges that for each of the tax years 1929 and 1930, petitioner filed a false and fraudulent return with intent to evade tax. The years stand separately. The establishment of fraud in the particular year is a prerequisite to further consideration of the case for that year. If there was no fraud, the statute of limitations has run against any deficiency for such year. If fraud be proven the case is before us on all issues for the year in question. Sec. 276 (a), Revenue Act of 1928.

Under the revenue laws every taxpayer is, in the first instance, his own assessor. He determines the amount of tax due. This privilege carries with it a concurrent responsibility to deal frankly and honestly with the Government—to make a full revelation and fair return of all income received and to claim no deductions not legally due. This responsibility is not properly discharged by resolving all

doubts against the Government, or by giving effect to studied efforts to wipe out taxable income by secret and ques-
157 tionable practices. It is a maxim of our law that, in dealing with the Government, taxpayers must turn square corners.

The responsibility of making a tax return is personal and rests squarely on the shoulders of the taxpayer. When he makes oath to the correctness of his return he assumes responsibility therefor. Only in rare instances can the consequences incident thereto be delegated to another.

Section 293 (b) of the Revenue Act of 1928 provides:

(b) Fraud.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

To determine whether or not fraud exists, a case must be studied, not alone for conformity to definition, nor with a blind adherence to syllogistic reasoning. Fraud is a fact to be proven by clear and convincing evidence. Seldom does all the evidence point one way. There are usually facts that tend to support petitioner's theory of the case—that tend to clear him of any fraudulent intent; and there are other facts that point in the opposite direction and tend to prove fraud. Likewise, the proof of fraud by the citation of one single specific act is seldom possible. It is usually to be determined by viewing a whole course of conduct involving many acts and
158 inferences. In this process of analysis the old illustration of the strength of a bundle of sticks is apt. Separate facts may be reasoned away and their force broken by plausible explanations, but when all of the facts in proof are bound together, the weak with the strong, they may create such an aggregate of strength as to defy refutation.

Nor is the absence of fraudulent intent necessarily established by the protestations of innocence of the parties, however vigorous. Sydney M. Shoenberg, 30 B. T. A. 659; affd.,—Fed. (2d)—(C. C. A., 8th Cir., 4/19/35); William C. deMille Production, Inc., 30 B. T. A. 826. It is to be gleaned from all the facts and the normal and reasonable inference therefrom. Though intent is a state of mind, its character is to be established, as other facts are established, by weighing all of the evidence and applying the proper measure of proof.

In this situation the trier of the facts is charged with the responsibility of passing on the credibility of the evidence. This duty involves the winnowing of the wheat of truth from the chaff of untruth—the sorting of the real from seeming. This duty is not without its inherent difficulty. In cases such as this, almost without exception, the taxpayer testifies categorically to the purity of his motives and the absence of fraudulent intent. And if, on the whole record, he convinces those charged with decision of his forthrightness of purpose, his innocence of improper motive, the impenetrable honesty of his position—if neither contradictory circumstance nor

inherent lack of probability weakens his credibility, he must prevail.
159 On the other hand, if, after listening to the taxpayers' protestations of innocence and hearing his explanations of his conduct, the trier of the facts is unable to give such protestations full weight and such explanations full credence, if on the whole record of fact, inference, and circumstance there abides in the mind of the trier a conviction, based on clear and convincing evidence, that fraud has been committed, then the decision must be against him. P. B. Fouke, 2 B. T. A. 219; L. Schepp Co., 25 B. T. A. 419.

The specific items in controversy for the year 1929, are the alleged sale by petitioner to his wife and the failure to report as income the large payment from the management fund.

The transaction with Mrs. Mitchell had its inception in an admitted desire and a purpose to reduce or obviate the payment of taxes. It has been said many times that there is nothing illegal or reprehensible in an honest effort to reduce taxes to the minimum required by law. United States v. Isham, 17 Wall. 496; Bullen v. Wisconsin, 240 U. S. 625; Chisholm v. Commissioner, — Fed. (2d) — — (C. C. A., 2d Cir., July 8, 1935). Theoretically, at least, there can be but one correct amount of tax due and it is in the ascertainment of this correct amount that most tax controversies have their origin. But the courts and the Board have also often said that a transaction solely designed to save taxes, especially one between husband and wife, will be subjected to strict scrutiny to determine whether the transaction is real or is merely a pretense. Commissioner v. Hale, 67 Fed. (2d) 561; Carl P. Dennett, 30 B. T. A. 49; Joseph P. Uihlein, 30 B. T. A. 399.

Before he took up with Mrs. Mitchell the question of a
160 possible sale to her of the stock, petitioner had come to the conclusion, by whatever process of reasoning employed, that the payment of $666,666.67, received from the management fund was not income. There remained approximately $2,800,000, in income which he desired to wipe out. He determined to accomplish this end by "registering a loss" (to use his words) on the 18,300 shares of National City Bank stock. He decided on a sale to his wife, subject to getting the advice of his attorney. In this matter petitioner protests that he would not have gone ahead had his attorney advised against such procedure, but here we are unable to give full weight to his declarations.

There are conceivable instances in which a taxpayer may shield himself behind the advice of counsel, but the facts in this case do not present such a situation. Petitioner was fully experienced in the business of making sales. It is not to be believed that he did not know the basic essentials of such a transaction, and that "a sale must rest on a genuine intention to dispose of property without reservation or evasion or mind." Sidney M. Shoenberg, supra. Moreover, despite his contention that he sought legal advice, intending to rely thereon, the record does not sustain such contention. Counsel told him the necessary requirements of a valid sale, and were these ele-

ments present in the facts we would hold the sale valid. However, petitioner did not reveal to counsel all of the necessary facts to enable him to advise definitely as to this particular sale, nor did counsel, with full knowledge of the facts, attempt or purport to advise petitioner to make the sale. By clear inference counsel suggested doubt as to the proposed sale. Moreover, petitioner
161 did not choose to follow such advice as was given. Although counsel told him that a very carefully drawn agreement was necessary, petitioner determined to follow his usual practice and exchange letters with his wife. We are convinced that he had chosen his course of action and that he proceeded to follow it, notwithstanding the cautionary advice of counsel. "Advice of counsel" affords him no shelter from the consequences of his conduct under the facts in this case.

The record reveals many facts of consequence. At the time of the alleged sale Mrs. Mitchell's total resources amounted to less than a million dollars. The sale price of the stock approximated four million dollars. The total amount of cash in Mrs. Mitchell's hands consisted of some $32,000. The so-called "interest" due to petitioner on account of the alleged sale amounted to approximately $196,000, per year. The dividends on the stock amounted to but $73,200 per year. The difference between these sums was furnished by petitioner to his wife, who in turn paid the same, and all money received as dividends, to petitioner. The stock was all pledged to secure a large loan with Morgan & Co.; therefore, no delivery was made or was possible. Though advised to notify Morgan & Co. of the alleged sale petitioner did not do so. Though advised that internal revenue stamps were required, no stamps were affixed. No bill of sale was executed. No payment on account of principal was ever made. There was no entry by Mrs. Mitchell on her books of any indebtedness to petitioner. Although Mrs. Mitchell claims to have bought in order to resell at a profit, she did not sell although
162 the market improved to such an extent that she could have sold at a profit of three quarters of a million dollars, thereby nearly doubling her fortune.

That petitioner deemed himself the owner of the stock at all times appears by clear inference in his efforts to have the National City Co. recognize the validity of his claim for relief and assume his obligation on the stock. It is significant that he did not reveal to his business associates during these negotiations the alleged disposition of the stock nor suggest that the claim had been sold to his wife.

The alleged repurchase corroborates the plain deduction from the above facts. Though the market had fallen to $45 per share, the price at which petitioner "reacquired" the stock was $212 per share, the price at the time Mrs. Mitchell was alleged to have bought. This transaction occurred at a time when petitioner was insolvent to an amount of $3,000,000. Had the sale been real, the relief of Mrs. Mitchell from the burden of interest could more simply have

been accomplished by releasing Mrs. Mitchell from the alleged obligation to pay interest.

Over against this array of circumstances, stand the protestations of petitioner that the entire transaction was bona fide; that the sale was actual; that title passed; and that the repurchase arose solely from petitioner's desire to protect his wife's separate estate. Explanations of some plausibility are offered of each step. But on the entire record of the transaction, according to each fact such weight as in our judgment deserves, drawing such inferences as logically flow from each circumstance, we find ourselves impelled to the
163 conclusion that petitioner never intended to part with title; that no real sale was made; and that at all times he was the true owner of the stock. We are of the opinion that the Government has proved by clear and convincing evidence that the transaction between petitioner and his wife was a sham, a mere pretense conceived and carried out for the fraudulent purpose of evading taxes. The petitioner sustained no loss on the transaction and the alleged loss is disallowed. See D. A. Belden, 30 B. T. A. 601, and cases there cited; Albert W. Findlay, 17 B. T. A. 828.

The other item in the 1929 situation is the failure to report for taxation the sum of $666,666.67, received as a distribution from the management fund in July 1929. The primary facts as to this item may be briefly summarized. The National City Co., in 1921, established a bonus system for certain officers of the company under the name "Management Fund." It was continued from year to year, and payments or distributions were made therefrom. Under corporate resolution the fund was built up by monthly accretions from profits. At the close of the current year, or at any time, or from time to time during the year, the executive committee was empowered to make distributions from the fund to the beneficiaries, one half in accordance with fixed percentages, and the remaining one half at the close of the year in such proportion as the committee should fix. The percentage of the president was fixed at 33⅓ percent of the entire fund and was not subject to the discretion of the committee. On January 3, 1929, the sum of $1,450,000 was distributed, petitioner receiving $483,333.33 of such sum. This was reported as
164 income. There remained in the 1928 fund after such payment the sum of $140,938.98.

On July 1, 1929, petitioner received a distribution of $666,666.67 from the 1929 management fund.

There were additional accumulations in the fund through the months following, until November. There were no credits to the fund in November and December, and the losses of the company during those months exceeded the profits earned during the first ten months of the year.

After various conferences in December 1929, initiated by petitioner, concerning the status of the fund and the payments therefrom, the recipients, including petitioner, signed the so-called "receipts", by the

terms of which the signer acknowledged that the payment "represented an overpayment * * * to be repaid from future ad litions to said management fund before [he became] entitled to any further payments therefrom." Book entries and corporate resolutions reflecting the action were made.

Petitioner did not report the sum so received from the management fund in his 1929 return.

On January 2, 1931, the sum of $140,938.98, remaining in the 1928 fund was distributed, petitioner receiving $50,515.53. This sum was not credited against the alleged overpayment for 1929. Subsequently the alleged obligation to repay was written down on the books of the company to $1.

That the payment received by petitioner was taxable as income seems beyond question. It was paid not as a loan or advance (cf. Lorenzo C. Dilks, 15 B. T. A. 1924; William H. Stayton, Inc.,
165 32 B. T. A. —), but without apparent qualification or restriction (No. 139). Siegel Co., 27 B. T. A. 62, and cases there cited. It was received and treated by the recipients as their own. It was not repaid during the taxable year or at any subsequent time. The changed condition in the finances of the company which led to the signing of the receipts was not anticipated and could not have been foreseen. The resolutions creating the fund and providing for its distribution did not provide for such a contingency. Nor did the signing of the receipts or the making of entries on the books of the company characterizing the payment as an overpayment subject to repayment out of future earnings alter the taxable character of the payment so received by petitioner. Its taxability was fixed at the time of payment. North American Oil Consolidated v. Burnet, 286 U. S. 517, and cases cited therein; James M. Butler, 19 B. T. A. 718; Jackson v. Smietanka, 272 Fed. 970; Harry B. Hurd, 12 B. T. A. 368; T. W. Henritze, 28 B. T. A. 1173; Siegel Co., supra. None of the cases cited by petitioner present parallel situations or are authoritative here. He lays special emphasis on the case of Gallin et al. v. National City Bank of New York et al., a case in the Supreme Court of New York County, New York, in which certain stockholders charged that the directors of the bank and the National City Co., had breached their statutory or common law duty in certain claimed respects, to the damage of the bank and the company. Among the alleged breaches were the establishment and distribution of manage-
ment funds, it being claimed that the same resulted in the
166 payment of exorbitant sums to officers and the waste and spoilation of corporate assets. Petitioner has culled certain expressions from the opinion of the court in that case which he claims sustain his position here in respect to the management fund. Singularly enough, respondent also points to certain statements of the court as strongly supporting his position.

We have examined the opinion with care and have come to the conclusion that it is neither pertinent nor author'ative in the case before us. There are expressions in the opinion which, taken from

their context, seem to lend support to one side or the other in the present controversy but which, if read in their context and considered in the light of the questions involved and decided by the court, are found to be of no help in determining the taxability of the management fund payment.

When the "receipt" is subjected to study, it is readily seen that it created no definite obligation to repay. Any repayment was dependent wholly on the continuance of the fund and its future earnings. But the fund existed only from year to year. It was subject to any corporate action that might be taken either extending it for another year, or, in corporate discretion, abolishing it entirely. The "receipt" was valueless without further action in its support, and was wholly dependent on future earnings. In no sense was it an enforceable, unqualified obligation to repay.

The conferences with counsel and other officers respecting the possibility of repayment, the signing of the receipts, the corporate action, and the making of book entries were largely at petitioner's initiation and followed his own decision that the payment
167 should not be considered as income. The springing into existence of these subsequently conceived facts in support of petitioner's determination already arrived at suggests the employment of deliberate artifice to give color to his action in not reporting the payment for taxation. They appear as mere gestures lacking in the spark of reality that distinguishes the genuine from the pretended.

When all the facts pertinent to this item are considered and it is noted that petitioner's tax accounting for 1929 was characterized by an apparent indifference to the right of the Government to receive its toll in the form of taxes; that all doubts were resolved against the Government; that the taxpayer omitted from income a large payment received and enjoyed by him and failed to reveal to the Government the fact of such payment, although, as he testifies, he considered its taxability a close question, and now defends such concealment on the patently lame excuse of a possible obligation to repay—when such a review is made—there can be little doubt as to the intent of the taxpayer. The omission of the item was due to an intention to defraud the Government of taxes. M. Rea Gano, 19 B. T. A. 518; D. C. Clarke, 22 B. T. A. 314; Joseph Carroro, 29 B. T. A. 646; Charles F. Long, 12 B. T. A. 488.

We conclude that the omission of the item of $666,666.67 from his tax return for 1929, was fraudulent.

When we examine the proof respecting the sale in 1930, and repurchase in 1931, of Anaconda Copper Co. stock we find a very different situation from that obtaining in the transaction involving National City Bank stock heretofore discussed.

168 Though the motive suggesting the sale was the reduction of taxes, as already pointed out, this motive alone does not condemn a sale. If the sale be actual, judged by the normal criteria of the law of sales, and there be nothing to indicate a lack of bona fides

in the transaction, such a sale may give rise to a lawful deduction. The same law that requires the reporting of profit received on a sale of property allows the deduction of a loss suffered in such a transaction. The test is the reality of the claimed loss and the genuineness of the factors involved.

Although there is a certain parallelism between some phases of the two transactions, there are vital differentiating elements. There was in each case an alleged sale for tax purposes and a subsequent repurchase at approximately the same price. In this the transactions are similar, but there the resemblance appear to end. In the 1929 "sale" the facts failed to integrate with the legal principles on which a sale must rest. In the 1930 sale there is a reasonable and satisfactory integration of the facts and governing principles. The evidence reveals that the several persons concerned in the 1930 sale were motivated by lawful impulses and that the design was to accomplish lawful ends. The repurchase likewise is found to rest on a reasonable and normal basis. It was closed at the market. It is not shown by fact, circumstances, or inference to have been a part of a preconceived plan by which the semblance of reality was given to a transaction by the implicit terms of which title never was intended to pass.

We find the sale of Anaconda Copper stock to have been bona
169 fide and lawful. Petitioner was, therefore, entitled to deduction of the loss so sustained. It follows that the claim of loss on this item afforded no basis for a finding of fraud.

We have indicated our conclusion that in 1929, petitioner conceived and carried out the alleged sale of National City Bank stock with the fraudulent purpose of evading taxes. This transaction involved various steps. On execution, each step became a part in a fraudulent plan and is stamped with the character of the plan. Among the steps taken were the arrangement to have the dividends paid to petitioner's wife and the return of the same by her for taxation. Since the stock was never sold these dividends at all times belonged to the petitioner. They should have been reported by him for taxation. Their omission from his return in 1930, in conformity with and in support of the fraudulent plan to evade taxes for 1929, is in itself, fraudulent. Section 293 (b) of the Revenue Act of 1928, provides that "if any part of any deficiency is due to fraud with intent to evade tax * * *" the penalty shall apply to the whole of such deficiency. We conclude that the return of petitioner for 1930 was false and fraudulent with intent to evade tax.

We come now to the final issue. Petitioner asserts that the identical matters here in controversy were involved in the case of United States v. Mitchell, in which he was acquitted by a jury in the Federal District Court for the Southern District of New York, and that the verdict in that case constitutes a bar against a decision in this proceeding. He argues, in effect, that the imposition of the penalties
prescribed in section 293 (b) of the Revenue Act of 1928, supra,
170 would constitute a second punishment for the same offense for

which he was indicted and of which he was acquitted under the provisions of section 146 (b) of the same revenue act.[2]

A careful study of the two sections convinces us that they are basically different in character and were enacted for wholly different purposes. The language of the two sections differs widely and contemplates situations which may require entirely dissimilar proof.

Section 146 (b) is a statute defining a felony and establishing punishment and penalties for the commission of a crime. It is a punitive statute and prosecution thereunder is strictly a criminal proceeding initiated by the United States. Section 293 (b) imposes an additional 50 percent of the deficiency if any part of the deficiency is due to fraud with intent to evade the tax. Proceedings thereunder are civil in character and are initiated by the taxpayer. The penalties contained therein are likewise civil and were inserted in the taxing statutes to aid in collecting revenue. Dorsheimer v. United States, 7 Wall. 166; Murphy v. United States, 272 U. S. 630; McDowell v. Heiner, 9 Fed. (2d) 120. They become a part of the deficiency in tax and are collected in the same manner as the deficiencies. Ely & Walker Dry Goods Co. v. United States, 34 Fed. (2d) 429; Thomas J. McLaughlin, 29 B. T. A. 247.

171 In William R. Scharton, 32 B. T. A. 459, the situation resembled that now before us, with the exception that the indictment of the petitioner was quashed. We there said:

Even if the quashing of the indictment in the criminal proceeding might be said to be a judgment of acquital, it is not res *judicata* in this proceeding. It is not even admissible as evidence of the truth or falsity of the facts decided in the prior proceeding. See Coffey v. United States, 116 U. S. 436; Stone v. United States, 167 U. S. 178; 34 Corpus Juris 971; 15 R. C. L. 1000–1003, and cases cited.

Although the quoted statement was perhaps obiter in view of the question there presented, we believe it to be a correct statement of the law. Stone v. United States, 167 U. S. 178. We are of the opinion that the indictment and acquittal of petitioner under section 146 (b) in the Federal District Court do not stand as a bar to decision in this proceeding.

The respondent, on brief, raises a question of the burden and necessity of proof as to the fraud charges, directing attention to the fact that the petitioner failed to file a reply to the charges of fraud until after the close of the hearing in chief and the filing of respondent's affirmative brief. In this situation he claims that the charges of fraud stand admitted under the pleadings and under the rules of the Board. Although our holding on the merits of the

[2] SEC. 146. PENALTIES.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

case probably makes this question academic, we deem it worthy of discussion.

172 The hearing was held April 30 to May 4, 1934. No mention for judgment on the issue of fraud was made at any time and the hearing was had and evidence was produced by the parties as though a reply to respondent's charges had been filed. On July 2, 1934, respondent filed his affirmative brief, in which he took the position that in the posture of the pleadings the charges of fraud stood admitted by petitioner. On July 20, 1934, petitioner filed a motion for leave to conform the pleadings to the proof or, in the alternative, to file a reply nunc pro tunc. On August 6, 1934, hearing with argument was had on the motion, at the conclusion of which the Division hearing the case granted the motion of petitioner for leave to file his reply denying respondent's allegations. The reply was forthwith filed.

We deem the action of the Division in permitting the filing of the reply to have been a proper exercise of its discretion and to dispose effectively of respondent's contention. The rules of the Board were thereby satisfied and the burden and requirement of proof rest normally. The burden of proving fraud rested on the Government. James Nicholson, 32 B. T. A. (No. 147).

Reviewed by the Board.

Decision will be entered under Rule 50.

Concurring opinion

BLACK, TRAMMELL, ARUNDELL, and LEECH concur in the result reached in the majority opinion and, while agreeing that the item of $666,666.67 received by petitioner as a distribution from the

173 management fund in July, 1929, constituted taxable income to him in that taxable year, do not agree that the evidence establishes fraud as to this item.

Opinion

MCMAHON, concurring in part and dissenting in part:

I

The parties stipulated as follows:

105. On April 25, 1933, an indictment was returned against petitioner by a Grand Jury of the District Court of the United States for the Southern District of New York. (Ex. 59.) To both counts in that indictment the petitioner entered a plea of not guilty.

106. Thereafter, petitioner was tried upon the charges contained in said indictment before Judge Henry W. Goddard and a trial jury in the said United States District Court, the trial commencing May 11, 1933, and terminating on June 22, 1933. A copy of the court's charge to the jury is contained in Ex. 60.

107. On June 22, 1933, a verdict of not guilty was returned by the jury on all counts of the indictment. A copy of the docket entries is Ex. 61.

They stipulated further upon the same subject:

That the issues so actually tried were those disclosed by the averments of the indictment; that evidence was offered by the Government in support of each of those charges and by defendant against each thereof and was received upon the trial and that for the purposes of this case the Government will not at any stage thereof raise the objection that those issues were not sufficiently identified by the indictment, plea, and charges.

Further stipulations on this subject immediately following the foregoing last unnumbered stipulation are omitted herein the interest of brevity as they neither add to nor detract from the foregoing stipulations.

The indictment and the plea of "not guilty" involve the same identical acts and intents of the petitioner and the same identical transactions and the same identical issues of fact as to whether the petitioner committed fraud, and the same identical, essential details and figures.

It is obvious from the findings of the majority and the whole of the record in the instant proceeding that the trial of the issues of fact which were presented in the proceedings in the United States District Court followed the same lines as the trial of the issues of fact in this proceeding. Because of the development of the proof in the District Court, the parties were able to stipulate over 100 paragraphs of items of fact, consisting in the neighborhood of 35 pages of stipulated facts, nearly all of which were printed, and to this extent stipulations were received in evidence, with numerous voluminous exhibits, in addition. With the exception of the testimony of petitioner's wife, who testified in this proceeding but did not testify in the District Court, the proof there and here as to the vital facts was substantially the same; and in some instances testimony of witnesses called in the District Court was by stipulation offered in evidence in this proceeding without producing the witnesses. These stipulations of the parties in this proceeding enabled the Board to commence the taking of evidence in this proceeding on April 30, 1934, and complete it on May 4, 1934, whereas the trial in the District Court was commenced on May 11, 1933, and completed on June 22, 1933.

The pleadings there and here and the charge of the District Court to the jury likewise show the close similarity of the issues of fact which were presented there as compared with the issues of fact which are presented here in respect to whether the petitioner committed fraud.

The statute, section 146 (b), Revenue Act of 1928, under which petitioner was indicted, tried and acquitted in the District Court provides that any one that "wilfully attempts in any manner to evade

or defeat any tax" is "guilty of a felony" and punishable by fine or imprisonment or both. The statute, section 293 (b), Revenue Act of 1928, which the respondent invokes in this proceeding provides that if any portion of a "deficiency is due to fraud with intent to evade tax" 50 per centum of the total of the deficiency shall be imposed and paid in addition to the deficiency. The language "due to fraud with intent to evade tax" is comprehended by the language "wilfully attempts in any manner to evade * * * tax." The language "in any manner" includes a fraudulent "manner." United States v. Miro, 60 Fed. (2d) 58; Paschen v. United States, 70 Fed. (2) 491.

176 Fraudulent manner comprehends that which is "due to fraud." The language "wilfully attempts" comprehends "with intent." He who wilfully "attempts" to do a thing does it "with intent." He can not attempt to do it without intending to do it. The words "to evade" are identical in both statutes. To charge a person with a deficiency in tax "due to fraud with intent to evade tax" is comprehended in a charge that he "wilfully attempts in any manner to evade * * * tax." All of the charges made by the Government in the District Court and here upon the subject of fraud are to the effect that he is guilty of fraud "to evade tax." In the last analysis this is the issue with which we are confronted in this proceeding and it is the issue which the court and jury were confronted with in the District Court. The purpose "to evade tax" is common to the proceedings there and here and in the last analysis it is the determinative issue there and here. It was incumbent upon the Government there to prove the petitioner guilty of a purpose "to evade tax" and it is likewise incumbent upon the Government here to prove the same purpose. The purpose "to evade tax" is an essential element in the charges made there and here. It is plain that the Government could not have prevailed there without proving such purpose and the Government should not prevail here without proving such purpose. Without proof of such purpose here as well as there, even though all other elements embraced within both statutes be established, the Government should not succeed under either statute. The question there and here of the existence of such purpose involves the same "acts, attempts, and intents" and "facts." The indictment

177 charged the petitioner with fraudulently attempting "to evade tax," and the court instructed the jury to the effect that before finding him guilty they must be satisfied from the evidence that he did act fraudulently.

No consequences can be visited upon any person under either statute without a finding of such purpose by a jury in a United States District Court or by the Board in a proceeding of this character. No such finding was made by the jury in the District Court and, as more fully pointed out herein, no such finding by the Board is justified by the record in this proceeding. When such finding of such purpose is justified and made and all other elements required by the statutes have been established, the consequences that flow from such finding are somewhat different, as pointed out more fully herein; but

any differences in such consequences are not determinative here, Coffey v. United States, infra.

The real question here in this respect is as to whether the final adjudication of a court and jury exonerating petitioner of a purpose "to evade tax" is a bar against the making of a finding and adjudication by this Board to the contrary; in other words, whether the adjudication of the District Court with the aid of a jury operates as a bar by way of res judicata here; and under the principles as laid down and the reasoning therefor as expounded by the Supreme Court of the United States in Coffey v. United States, 116 U. S. 436, and elsewhere, as herein pointed out, the adjudication of the District Court with the aid of the jury is a bar by way of res judicata here.

Coffey v. United States, supra, involved an information filed
178 by the United States against certain distilled spirits and distilling apparatus which were under seizure as being forfeited to the United States under the provisions of sections 3257, 3450, and 3453 of the Revised Statutes of the United States. Coffey filed a claim to all the property except one barrel of the spirits, and by way of answer set up, as a bar, the verdict of a jury finding him not guilty and the judgment of the court acquitting him in a criminal information involving the same acts and circumstances and the same statutes as are above referred to, and, in addition, sections 3256, 3296, and 3452 of the Revised Statutes. The Supreme Court, in holding that the judgment of acquittal operated as a bar to the suit for forfeiture, stated in part:

The principal question is as to the effect of the indictment, trial, verdict, and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on §§ 3257, 3450, and 3453, and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts, and intents averred in the information in this suit. The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is.

It is true that § 3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the
179 tax on the spirits distilled by him, declares the consequences of the commisison of the act to be (1) that certain specific property shall be forfeited; and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the res named must be a proceeding in rem and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat, 1, 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive

in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. *It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit in rem. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.*

This doctrine [the doctrine of res judicata laid down in Gelston v. Hoyt, 3 Wheat., 246] *is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other.* The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceedings, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts * * * [Italics supplied.]

The Coffey case, while it may not be followed by some state courts, is binding upon all branches of the Federal Government until the Supreme Court overrules it or Congress enacts legislation to the contrary. In United States v. Seattle Brewing & Malting Co., 135 Fed. 597, which follows the Coffey case, it is stated:

* * * In later decisions by the Supreme Court the Coffey case has been referred to, but without modifying or departing from the rule which it established. See Stone v. United States, 167 U. S. 178, 196, 17 Sup. Ct. 778, 42 L. Ed. 127. * * *

The Coffey case was also followed in National Surety Co. v. United States, 17 Fed. (2d) 369.

In the instant proceeding we are concerned with a penalty, while in Coffey v. United States the Court was concerned with a forfeiture. However, there is no substantial difference between the forfeiture there involved and the penalty here involved. Both are of a penal nature. Both contain elements of punishment. They are sometimes used synonymously. The word "forfeiture" is defined in Black's Law Dictionary, 3d Ed., as follows:

The incurring a liability to pay a definite sum of money as the consequence of violating the provisions of some statute, or refusal

to comply with some requirement of law. State v. Marion County Comm'rs., 85 Ind. 493.

A thing or sum of money forfeited. Something imposed as a punishment for an offense or deliquency. The word in this sense is frequently associated with the word "penalty." Van Buren v. Digges, 11 How. 477, 13 L. Ed. 771; Bryant v. Rich's Grill, 216 Mass. 344, 103 N. E. 925, 927. Ann. Cas. 1915B 869; Miller v. Bopp, 136 La. 788, 67 So. 831; Jones v. State, 10 Okl. Cr. 216, 136 P. 182, 183; Missouri, K. & T. Ry. Co. v. Dewey Portland Cement Co., 113 Okl. 142, 242 P. 257, 259.

In United States v. Chouteau, 102 U. S. 603, the Supreme Court stated:

182 The term "penalty" involves the idea of *punishment*, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. [Italics supplied.]

The case of Stone v. United States, 167 U. S. 178, is not applicable to this proceeding. The distinction between that case and Coffey v. United States, supra, there made by the Supreme Court, is as follows:

The present action is unlike that against Coffey. This is not a suit to recover a penalty, to impose a punishment, or to declare a forfeiture. The only relief sought here is a judgment for the value of property [timber on Government lands] wrongfully converted by the defendant. The proceeding by libel against Coffey, *although civil in form, was penal in its nature*, because it sought to have an adjudication of the forfeiture of his property for acts prohibited. It was, as we have seen, a case in which a punishment, denounced by statute, was sought to be inflicted as a consequence of *the existence of facts that were in issue and had been finally determined* against the United States in a criminal proceeding. * * * [Italics supplied.]

In Chantangco v. Abarao, 218 U. S. 476, the Supreme Court stated:

183 There are peculiarities about the character of the action now under consideration which, as will appear later, may bring it under the principles of Coffey v. United States, supra, rather than Stone v. United States (supra) the indemnification here sought being part of the punishment attached to the offense of which the defendant has been acquitted.

In United States v. LaFrance, 282 U. S. 568, the United States Supreme Court stated as follows:

* * * A "tax" is an enforced contribution to provide for the support of government; a "penalty," as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by Lipke v. Lederer, 259 U. S. 557, 561–562 * * *. See also Regal Drug

Corp. v. Wardell, 260 U. S. 386, * * *. There is nothing in United States v. One Ford Coupe, 272 U. S. 321 * * *, or Murphy v. United States, 272 U. S. 630, * * * to the contrary. The first of these cases was a proceeding to forfeit an automobile because used in violation of law; the other was a suit in equity to enjoin the occupation and use of premises for a year because used in the
184 commission of offenses under the National Prohibition Act, and to abate the maintenance as a nuisance. *The distinction made by these four cases is that in the first two, the purpose of the proceeding was punishment; while as to the other two, the purpose in the first case was to enforce a simple tax, not one which had been, as here, converted, by a change of its nature, into a penalty, and in the second case the purpose was prevention.* Murphy v. United States, supra page 632 of 272 U. S. * * *. [Italics supplied.]

See discussion of "tax" in United States v. Glidden Co., — Fed. (2d) — (C. C. A., 6th Cir., June 29, 1935).

Section 146 (b), supra, expressly provides that the penalties therein prescribed, fine or imprison or both, shall be "in addition to other *penalties* provided by law." (Emphasis supplies.) The only other *penalty* thus provided for any of that which is denounced in section 146 (b) is the *penalty* of 50 per centum of the deficiency prescribed by section 293 (b), supra. Both subsections deal with the same taxation and are a part of the statutory scheme of such taxation.

The case of Murphy v. United States, 272 U. S. 630, is not in point. There was not involved in that case any penalty, punishment, or forfeiture such as was involved in Coffey v. United States, supra, and is involved in the instant proceeding. That case is analogous to Stone v. United States, supra, whereas the instant proceeding is analogous to Coffey v. United States. It was held in Murphy v. United States, supra, that a prior acquittal of the maintenance of a nuisance under the National Prohibition Act was not a
185 bar to a suit in equity for the abatement of a nuisance and an injunction, since the purpose of the latter "is *prevention*, not a second punishment that could not be inflicted after acquittal from the first." (Italics supplied.) Murphy v. United States and Stone v. United States, supra, each involved a civil suit, which is in the latter case distinguished from Coffey v. United States, a quasi criminal proceeding. The instant proceeding, like Coffey v. United States, though civil in form, is quasi-criminal. It involves the recovery of a penalty and as such "is unquestionably criminal in its nature." Lees v. United States, 150 U. S. 476, 480; Boyd v. United States, 116 U. S. 616. In Black's Law Dictionary, supra, "quasi crimes" are defined as follows:

This term embraces all offenses not crimes or misdemeanors, but that are in the nature of crimes—a class of offenses against the public which have not been declared crimes, but wrongs against the general or local public which it is proper should be repressed or punished by forfeitures and penalties. This would embrace all qui tam actions and forfeitures imposed for the neglect or violation of a public duty.

A quasi crime would not embrace an indictable offense, whatever might be its grade, but simply forfeitures for a wrong done to the public, whether voluntary or involuntary, where a penalty is given whether recoverable by criminal or civil process. Wiggins v. Chicago, 68 Ill. 375. * * *

The case of Hanby v. Commissioner, 67 Fed. (2d) 125, is
186 distinguishable. There the acquittal of the taxpayer relied upon as a bar, under the doctrine of res judicata, to the imposition of fraud penalties with respect to original Federal tax returns, was an acquittal upon an indictment charging wilful attempts to defeat and evade with reference to amended returns. As correctly pointed out by the court, there can be no estoppel by judgment where the former and subsequent case do not involve the same claim or demand, or the same point or question. A portion of the opinion of the court in Hanby v. Commissioner, supra, deals with the doctrine of double jeopardy, a second question there presented; and is not applicable here, as we are not here confronted with a double jeopardy.

The fact that the present proceeding is an entirely separate proceeding from that against this petitioner in the District Court does not preclude the application of the doctrine of res judicata. The doctrine applies as to the facts, questions, rights, or issues involved under the circumstances and conditions here, which are the same facts, questions, rights, or issues involved in that proceeding under the same circumstances and conditions. Tait v. Western Md. Ry. Co., 62 Fed. (2d) 973; affd., 289 U. S. 620; and Charles P. Leininger, 29 B. T. A. 847.

It is sufficient if the evidence present in the instant proceeding was available in the criminal proceeding before the court. Tait v. Western Md. Ry. Co., 62 Fed. (2d) 973, supra, and Charles P. Leininger, supra. Here there is no showing that any of the evidence presented in the instant proceeding was not available for presentation
in the District Court. On the contrary, it appears that some
187 of the testimony in the instant proceeding, but not in the record of the District Court, was just as available at the time of the trial in the District Court as at the hearing before the Board.

Res judicata is a species of equitable estoppel. Charles P. Leininger, supra, and Tait v. Western Md. Ry. Co., 289 U. S. 620, supra. It embraces estoppel by judgment and by verdict. 34 C. J. 745.

In Appeal of Union Metal Manufacturing Co., 4 B. T. A. 287, we stated in part as follows:

The doctrine of *res judicata*, the matter adjudged, supposes the finality of the determination so that it may *put an end to litigation of the same controversy*. [Italics supplied.]

In Coffey v. United States, supra, the Supreme Court of the United States pointed out that this doctrine of res judicata "is peculiarly applicable to a case like the present, where in both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other," and after expressly

rejecting the contention that the doctrine should not be therein applied on the ground "that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt."

There may be something of a twilight zone between the rule requiring, of the party bearing the burden, proof of guilt of fraud beyond a reasonable doubt on the one side and the rule requiring, of the party bearing the burden, proof of guilt of the same
188 fraud by a preponderance of evidence and by clear and convincing evidence on the other side. (Henry S. Kerbaugh, 29 B. T. A. 1014, infra); but in view of what the Supreme Court said on this subject in Coffey v. United States, supra, it is unnecessary to here further explore such twilight zone, if any.

All of the salutary, underlying principles of justice upon which the doctrine of equitable estoppel by res judicata are based, 34 C. J. 743, 744 and 15 R. C. L. 954, 955 and which are grounded in sound public policy, call for the application of that doctrine to the instant proceeding, in view of the record and undisputed facts and circumstances here, which, among other things, discloses fully the record in the District Court in United States v. Charles E. Mitchell, who was the defendant there and is the petitioner here.

Upon the authorities heretofore pointed out and for the reasons heretofore indicated herein, I am constrained to respectfully dissent from the finding and holding of the majority to the effect that the adjudication of that court with the aid of a jury does not operate as a bar by way of res judicata in this proceeding.

The authorities cited by the majority do not justify, much less require, the conclusion they have reached in this respect. No sound reasons have been advanced to justify not following Coffey v. United States, supra, with all of its implications.

It is elementary that taxation is eminently practical, we are here concerned only with tax statutes; and practical considerations require that when a controversy involving fraud under these
189 statutes, such as was terminated by the District Court with the aid of a jury, is terminated, it remain terminated. The doctrine of res judicata is sometimes called the "doctrine of peace." 34 C. J. 744.

It may not be amiss to obesrve that, if there had been an adjudication by the District Court with the aid of a jury convicting the petitioner of fraud, such adjudication likewise would have been a bar by way of res judicata here. Assuming such conviction and also imprisonment, and that, while he was serving his sentence, the Board, on substantially the same facts and circumstances upon which the jury convicted him and the court imprisoned him, found and held that he had not committed the fraud found by the jury, an incongruous situation would be presented. The doctrine of res judicata would avert that sort of thing.

II

Under section 907 (a) of the Revenue Act of 1928 the burden of proving fraud on the part of the petitioner in each instance rests upon the respondent; and this burden carries with it the obligation of proving such fraud, as set forth by the Board in Henry S. Kerbaugh, 29 B. T. A. 1014; affd., Commissioner v. Kerbaugh, 74 Fed. (2d) 749, as follows:

* * * A charge of fraud has always been regarded as a serious matter in the law. Not only is it never presumed, but the ordinary preponderance of evidence is not sufficient to establish such a charge. It must be proved by clear and convincing evidence. * * *

190 Under all of the facts and circumstances presented by the record in this proceeding it can not, with justification, be found or held, as the majority in effect has found and held, that the petitioner was guilty of fraud in the respects stated by the majority, in view of the fact, which is also found as a fact by the majority, that a District Court of the United States, with the aid of a jury of his peers, 12 laymen acquitted the petitioner of all of the same charges of fraud, upon substantially the same facts and circumstances as are presented here. The verdict of the jury at the very outset must give us pause; and with that verdict in the record, as we have it here, fortified by such facts and circumstances, it can not, with justification, be found and held that the petitioner has been proven guilty of fraud by such clear and convincing evidence as is required by the principles of the Kerbaugh case. These principles should be closely adhered to here; the penalty approved by the majority, in principal alone, for the one year 1929 is approximately 36 times as great as the maximum of the fine which the court could have imposed if there had been a conviction for fraud for that year. This is a drastic penalty.

Too, the petitioner made out a stronger case here, due to the fact that his wife testified fully in the instant proceeding in corroboration of petitioner's testimony and otherwise. Contrary to her desires, she did not testify in the District Court, but she was just as accessible there as here.

It is true that the author of the majority report is at an advantage over all the other members of the Board as now con-

191 stituted in that the author heard the witnesses and had the advantage of observing them upon the stand, but the twelve jurors had the same advantage; and none of the witnesses was impeached, and considerable of the proof is in the form of stipulations and records; and, in view of the whole record, any advantage in this respect is of little consequence.

So, irrespective of whether the adjudication of the District Court with the aid of a jury is conclusive upon the Board as a bar under the doctrine of res judicata, the respondent, in view of the exoneration of the petitioner of all fraud by the court and jury, has not, under all the facts and circumstances presented here, discharged his

burden of proof that petitioner committed fraud by clear and convincing evidence, as required of respondent under the principles of the Kerbaugh case.

III

I agree with the majority that there was no fraud committed by the petitioner in connection with the sale on December 26, 1930, of the 8,500 shares of Anaconda Copper Mining Co. stock to Thornton. As to this transaction the Board is unanimous in reaching the same result the District Court reached with the aid of the jury. If the vital evidence in that transaction be compared step by step with the vital evidence of the transaction between the petitioner and his wife through the repurchase by the petitioner, such comparison leads to the conclusion that the finding and holding that the petitioner committed fraud in connection with the sale to his wife of
192 the 18,300 shares of National City Bank stock on December 20, 1929, is inconsistent with the finding and holding of the majority that the petitioner was free from fraud in the transaction with Thornton. There are no vital differences between these two transactions. Looking to substance and not to form, as we must do, the vital controlling determinative evidence as to the sale made by petitioner to his wife is similar to that as to the sale through his friend Ryan to their mutual acquaintance Thornton, whose attitude was friendly to both. Petitioner was a party to both transactions. Both sales were made just before the close of taxable years for the purpose of establishing deductible losses by disposing of the stock. As to each no questions are raised about the acquisition of the stock or the basis of the loss, which is actual cost in money. Both sales were at open market prices. As to each, for all practical purposes, before the sale a real depreciation readily measurable with certainty had been experienced by petitioner in the tax year before us, with the result that petitioner was out of pocket heavily with an asset on and having a market value considerably below the money cost. Both purchases were made upon the credit of the purchasers. Neither purchaser paid out any unborrowed money of his or her own in payment of the purchase price. Both paid considerable interest at current rates on the amounts of the purchase prices. Both purchasers were owners, previously, of the same kind of stock. Federal stock transfer stamps were ultimately paid for on the transfers of both stocks. Both stocks were carried in the names of the nominees.
193 As to each all dividends paid were paid to the nominees and by them paid over or fully accounted for to the purchaser as owner of the stock purchased. Each purchaser could have sold at a profit but did not choose to do so (and could not have been required to do so), obviously because of the expectation of a better rise in the market. As to each stock petitioner, long after the expiration of 30 days, repurchased the same number of shares of stock from the person to whom he had sold the stock, thereby relieving that person of

the stock at a loss to such person. Both repurchases were on a basis whereby petitioner saved the purchasers nearly whole. Petitioner relied upon the advice of the same legal counsel in the making of both sales. Both sales were made with the mutual intention of transferring absolute title to the purchasers. Both sales were made for the purpose of enabling the purchasers to derive a profit therefrom. No bill of sale was used in either sale. Substantially similar formalities were resorted to in both sales; and notices were given to all who had a right to be notified. As to each it was not necessary to publicize the sales. As to both such publicity might have proven disastrous to the stockholders and creditors, including the depositors of the bank, of the corporations involved. All of the delivery of the shares that was possible or necessary was made in connection with each sale. Cf. Tracy v. Commissioner, 70 Fed. (2d) 930. All of the control of each stock which petitioner possessed passed from petitioner to the purchaser. In each instance Morgan & Co. held the stock as collateral and was at the time of the sale adequately secured.

194 IV

In some respects the proof as to the bona fides of the sale to petitioner's wife is more favorable. Petitioner's wife reported as income all of the dividends received by her in 1930 and subsequently on the stock which he sold her. In her income tax returns for 1930 and subsequently she deducted all interest paid to him in that year on the purchase price of the stock. An entry of the sale under date of the sale was made in due course in her ledger. She paid him over a quarter of a million dollars on account of the sale made to her in excess of the dividends received by her on the stock and over $6,000 of this excess was exclusive of any gifts received by her from him. She had had numerous previous business transactions with petitioner over a considerable period of time, and had taken losses as well as profits on them. She had had similar transactions with others. She was financially responsible. Her overdrafts upon her bank were covered by securities. Her agreement embodied in the letters to pay the purchase price were just as binding as if she had given promissory notes therefor.

The sale of the 18,300 shares of National City Bank stock made by the petitioner to his wife on December 20, 1929, was a bona fide sale, and the loss resulting therefrom sustained by the petitioner is deductible under section 23 (e) of the Revenue Act of 1928 upon the authority of the following cases: Commissioner v. Hale, 67 Fed. (2d) 561, affirming memorandum opinion of the board rendered April 20, 1932; Joseph E. Uihlein, 30 B. T. A. 399; and Carl P. Dennett,
195 30 B. T. A. 49. See Thomas W. Behan, 32 B. T. A. —— (No. 164); Benjamin Burton, 28 B. T. A. 1242; Andrew J. Peters, 28 B. T. A. 976; Frank B. Gummey, 26 B. T. A. 894; and Merritt J. Corbett, 16 B. T. A. 1231.

The instant proceeding is distinguishable from the following cases insofar as they bear upon the bona fides of the sales involved therein: Albert W. Finlay, 17 B. T. A. 828; Luella Hoyt Slayton, 29 B. T. A. 931; Lulu Tirrill Coombs, 30 B. T. A. 35; Joseph Blumenthal, 30 B. T. A. 125; W. E. Brochon, 30 B. T. A. 404; D. A. Belden, 30 B. T. A. 601; Sydney M. Shoenberg, 30 B. T. A. 659; James W. Singer, 32 B. T. A. 177; and James Nicholson, 32 B. T. A. —— (No. 147).

Since the sale of December 20, 1929, was a bona fide sale, the petitioner did not commit fraud in the making of the sale. However, even if we assume for the purpose of this discussion that such sale was not a bona fide sale, there still remains the question as to whether or not the petitioner committed fraud in the making of the sale. James Nicholson, supra. The evidence in the record does not justify a finding or holding that the petitioner committed such fraud. As stated in James Nicholson, supra:

Here fraud is not admitted. The mere fact that his return showed a net income for the taxable year 1929 in the sum of $40,424.66 and the respondent, in recomputing his tax liability, determined that the net income for that year was $73,435.38, by itself, does not establish fraud. If it did, then all taxpayers against whom
196 deficiencies are determined would be guilty of fraud and subject to the imposition of a fraud penalty. Nor does the lack of evidence to sustain the petitioners' contentions prove fraud. As stated in L. Schepp Co., supra, "both parties may fail through inadequate proof in their several issues, and thus the deficiency would be sustained and the penalty set aside." The burden of proving fraud is upon the respondent and his proof must be clear and convincing. * * *

That a sale was made for the purpose of reducing income taxes does not invalidate such sale. It has been so held repeatedly by the Board and the courts. In Helvering v. Gregory, 69 Fed. (2d) 809, the court stated:

We agree with the Board and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose the pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes. U. S. v. Isham, 17 Wall. 496, 506 * * *; Bullen v. Wisconsin, 240 U. S. 625, 630 * * *.

To the same effect see Gregory v. Helvering, 203 U. S. 465, affirming Helvering v. Gregory, supra; Chisholm v. Commissioner, —— Fed. (2d) —— (July 8, 1935); and Joseph E. Uihlein, supra.

The majority discredits the petitioner's statement that he would not have gone ahead with the sale to his wife had his attorney advised against it upon the assumption that he did not follow the advice of his counsel in some respects. His counsel assisted him in the preparation of the agreements in the form of letters, and the whole of the

record discloses that his counsel finally concluded that it was not necessary for the petitioner to give notice of the sale to Morgan & Co. Furthermore, his failure to give such notice is fully explained and justified by the evidence. His failure to affix revenue stamps was due wholly to oversight. The undisputed proof is that he discussed with his attorney everything that it was necessary for him to discuss or to disclose so as to enable his attorney to render an opinion. While he did not state the precise amount of the net worth of his wife, he did state that she was financially responsible and his attorney accepted that as being true. Bearing in mind that the stock had a market value and that it was expected that the market value would increase, the financial responsibility of Mrs. Mitchell was sufficiently adequate to repel the charge of fraud as against the petitioner. It is common knowledge that property, real and personal, is frequently purchased on credit even by persons with considerably less resources, comparatively, all with the expectation of paying therefor out of future income or out of proceeds on
198 resale; and this does not constitute fraud. A sale made on credit is as valid a sale as one made for cash. No bill of sale was necessary to validate the sale. The petitioner had the right to make gifts to his wife. He had also made gifts to her previous to the sale. In Thomas W. Behan, supra, the Board stated:

* * * *If the transfer of funds from the petitioner to his wife were unexplained, that would not afford sufficient reason in this case for denying the losses to the petitioner.* Frank M. Arguimbau, 31 B. T. A. 604. Here the parties have stipulated, however, that the petitioner made certain gifts of money to his wife. There is a companion case to this one wherein the wife is claiming deductions for losses under similar circumstances. The statement of facts in that case shows that she returned to her husband some of the amounts which he advanced to her and also at times transferred funds from her bank account to his bank account apparently for the purpose of enabling him to make contemporaneous purchases of securities. *The fact that this husband and wife aided one another in this way is not, in view of the other facts in the case, a reason for denying the petitioner deduction for his losses.* [Italics supplied.]

See also Benjamin T. Burton, supra; and Merritt J. Corbett, supra.

The stock was entered in Mrs. Mitchell's ledger. Whether or not the debt for the purchase price was entered is immaterial in
199 view of the fact that it has not been shown that Mrs. Mitchell kept an elaborate system of books, showing all her liabilities, as well as her investments. Furthermore, it is elementary that the facts are controlling and not the presence or absence of book entries.

The petitioner's further purpose in selling the stock to his wife was to give her an opportunity to make a profit and also to avoid dumping the stock on the market to the detriment of the bank and of the National City Co. He did not want her to sustain a loss and his repurchase at the same price at which he had sold it to her under

all the facts and circumstances is such a natural act based upon human experience, that a charge of bad faith or fraud on that score is untenable.

Mrs. Mitchell's failure to sell is founded upon her belief that the stock would regain more of its former value. That she waited too long is an error of judgment and is not indicative of bad faith or fraud on the part of the petitioner.

The record discloses that the petitioner did inform some of his associate directors that he had sold the stock to his wife. Harry W. Forbes, of the law firm acting as general counsel for the National City Bank and for the National City Co., knew of the sale and advised petitioner thereon. Guy Cary of the same firm also had knowledge of the sale, as appears from the findings of the majority that he advised the petitioner in reference to the debt of Mrs. Mitchell arising from such sale. Others were so informed. It is not customary and there was no legal obligation resting upon the petitioner to broadcast, or to keep all of his business associates informed, regarding his dealings with his wife or others.

200

The fact that the petitioner presented a claim for a loss sustained on account of his purchase of the 18,300 shares of National City Bank stock to the National City Co. is not determinative here, under all the facts and circumstances. His financial affairs had become very much involved. In the first instance he merely presented the claim for consideration. His counsel advised him he had a valid claim. The company's counsel advised the company merely that he had no "legal" claim but did question the justice of his claim. Upon the legality of his claim being thus questioned, he withdrew it. Furthermore, he first discussed the matter of making such claim with Guy Cary, whom the petitioner had previously informed of the sale to his wife.

The cases cited by the majority in support of its findings and holding that fraud was committed by petitioner are distinguishable upon the facts.

Although petitioner repurchased the stock, this is no proof of fraud, nor does a repurchase invalidate a sale. Under the applicable revenue act losses from sales of stock are deductible even if repurchased, except where it appears that within thirty days before or after the date of such sale the taxpayer has acquired or has entered into a contract or option to acquire the same stock. Sec. 118, Revenue Act of 1928. The evidence discloses that the petitioner did not repurchase the stock within thirty days after its sale to his wife or, at any time previous to the repurchase more than two years later, agree to repurchase it.

201

That a loss sustained upon the sale of shares of stock constitutes a statutory deduction in the years involved in this proceeding cannot be questioned even though the sale was made by a husband to his wife. Carl P. Dennett, supra; Joseph E. Eihlein, supra; and Commissioner v. Hale, supra. No question has been raised here about the right of a husband to make sales to his wife or vice versa,

under the laws of New York. This deductibility is further shown by the fact that Congress for the first time in the Revenue Act of 1934 provided that in computing net income no deduction shall be allowed in respect to a loss from sales or exchanges of property, directly or indirectly, between members of a family, which include brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants. Sec. 24 (6) (A), (D), Revenue Act of 1934.

The purpose of the enactment of this provision is stated in Report No. 558 of the Committee on Finance, 73d Cong., 2d sess., p. 27, as follows:

"Experience shows that the practice of creating losses through transactions between members of a family and close corporations has been frequently utilized for *avoiding* the income tax. It is believed that this provision will operate to close this loophole of tax avoidance." [Italics supplied.]

This language discloses that sales between members of the same family had theretofore been regarded as valid to create deduct-
202 ible losses under the revenue acts and as made in tax avoidance, rather than in tax evasion or fraud. Since Congress had, under revenue acts prior to the Revenue Act of 1934, including those applicable here, permitted the deduction of losses resulting from the sale of stock without limitation as to the relationship of the seller and purchaser, except as to sales involving a repurchase within the thirty days, it was within the power of Congress, and that of Congress alone, to prohibit deductions of losses on sales made between husband and wife.

Since there was no fraud committed in the sale of the stock on December 20, 1929, it follows that there was no fraud committed by petitioner in 1930 because of his failure to report as income the dividends paid on the 18,300 shares of National City Bank stock, the stock being the property of the petitioner's wife, and she, not he, being entitled to the dividends thereon.

V

I agree with the concurring opinion of Members Black, Trammell, Arundell, and Leech that the evidence does not establish fraud as to the item of $666,666.67 received by the petitioner as a distribution from the management fund in July 1929. In this view, the statute of limitations has run and hence it is unnecessary to pass upon the issue as to whether it was income to petitioner in 1929, as was concluded by them. Legal counsel, including a former (then recent) Under Secretary of the Treasury of the United States,
203 relied on I. T. 2043, III-2, C. B. 94, in advising the National City Co. and the petitioner that this and other items of the same character were not deductible by it as expense in 1929 or includable in income for 1929 by him or other recipients of such items, on the ground, in effect, that this and other such items were overdrafts and hence debts due to the National City Co. from the re-

cipients by the close of 1929, under all the facts and circumstances. Cf. William H. Slayton, Jr., 32 B. T. A. —— (No. 139).

Their concurring opinion well illustrates the rule that acts may be unlawful but free from fraud, and the heavy burden that rests upon the respondent to prove fraud by clear and convincing evidence, which is more than a preponderance of evidence, even where such acts are unlawful. James Nicholson, supra.

Even if it be assumed that this item was income to the petitioner and an expense to the National City Co., there is no evidence in the record which justifies a finding or holding that petitioner, in failing to include this item in his taxable income for 1929, committed fraud. The following by a client of a mistaken opinion of competent lawyers does not constitute fraud. The best of lawyers make mistakes of this character.

A taxpayer is not required to disregard the advice of legal counsel at the peril of imprisonment or severe penalties for following it. Counsel here, after full investigation of the law and an exchange of views, concurred in the advice to the National City Co. and the petitioner to the effect that this item of $666,666.67 was not deductible by the former as an expense or includable in income by the
204 latter; and it was not deducted by the former. Both had specialized in the field of Federal income taxation. It was conceded by counsel for the respondent at the hearing that the board of directors of the National City Co., of which this former Under Secretary of the Treasury was one, while not a recipient of any of the management fund, "were distinguished bankers and well-known in the community" and "men of large affairs in the business world." In at least two instances recipients of moneys from the management fund in 1929 who were in a position to do so have since made payment. The payment of the $140,438.98 is fully explained in the proof wholly in keeping with freedom from fraud on the part of petitioner as to the $666,666.67.

VI

The proceedings of this Board are conducted in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. Sec. 907 (a), Revenue Act of 1924, as amended by sec. 601, Revenue Act of 1928.

In Brown v. Peterson, 25 App. D. C. 359, the Court of Appeals for the District of Columbia stated:

"* * * The law is that positive testimony uncontradicted and not inherently improbable, is prima facie evidence of the fact which it seeks to establish, and the jury is not at liberty to disregard it." Crane v. Morris, 6 Pet. 598, 8 L. Ed. 514; Kelly v. Jackson, 6 Pet. 622,
L. Ed. 523; Quock Ting v. United States, 140 U. S. 417, 35
205 L. Ed. 501, 11 Sup. Ct. Rep. 733, 851; The City of New York (Alexandre v. Machan) 147 U. S. 72, 31 L. Ed. 84, 13 Sup. Ct. Rep. 211.

To the same effect is Walker v. Warner, 31 App. D. C. 76.

In Epremiam v. Ward, 169 Fed. 691, it was stated:

"The court is bound to give credence to uncontradicted testimony even from interested persons when it is substantiated as it was here, and is not inconsistent with well-known facts, experience, and reason."

In Blackmer v. Commissioner, 70 Fed. (2d) 255 (C. C. A., 2d. Cir.), the court said:

"* * * *When the evidence before the Board, as the trier of the facts, ought to be convincing, it may not say that it is not.*" Sioux City Stockyard Co. v. Commr., 59 Fed. 2, 944 (C. C. A. 8); Conrad & Co. v. Commr., 50 Fed. 2, 576 (C. C. A. 1); Chicago Ry. Equipment Co. v. Blair, 20 Fed. 2, 10 (C. C. A. 7). "*And the Board may not arbitrarily discredit the testimony of an unimpeaced taxpayer so far as he testifies to facts.*" [Italics supplied.]

To the same general effect as the foregoing cases are Tracy v. Commissioner, supra (C. C. A. 6th Cir.); Planters Operating Co. v. Commissioner, 55 Fed. (2d) 583 (C. C. A., 8th Cir.); Citrus Soap Co. of California v. Lucas, 42 Fed. (2d) 372 (C. C. A., 9th Cir.).

206 See discussion at page 472 of the opinion in Jewett & Co. v. Commissioner, 61 Fed. (2d) 471 (C. C. A., 2d Cir.).

The burden of proof is not discharged by presenting facts which are susceptible of conflicting interferences. Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333; U. S. F. & G. Co. v. Des Moines National Bank, 145 Fed. 273; and Dickeron v. United States, 18 Fed. (2d) 887.

Upon the foregoing authorities, and the authority of the Kerbaugh case, which requires that fraud shall be proven not only by a preponderance of the evidence but by clear and convincing evidence, the proof in this proceeding requires that petitioner be here exonerated of all of the charges of fraud, as the District Court and jury exonerated him of the same charges, and as the majority has exonerated him of one of those same charges, and all on substantially the same evidence, including his own. If his testimony is credible on one issue of fraud it should not be disregarded as to the others, in view of the whole record. The proof fully and satisfactorily explains everything that occurred in so far as explanation is essential to correct desision here, all wholly consistent with freedom from fraud on petitioner's part. There is no inherent or other improbability in the statements of petitioner or his witnesses and there is nothing in the record to discredit their testimony. They readily produced all the proof they had. The record does not indicate any concealment of any proof before or at the hearing. The respondent has not impeached or rebutted the vital, controlling determinative full evidence produced by petitioner. Such evidence remains undisputed. The testimony of petitioner and his

207 witnesses is corroborated by writings and voluminous exhibits, and by numerous written and oral stipultations. The testimony of petitioner, his wife and his other witnesses is comprehensive, clear, and consistent throughout. Their testimony is unequivocal

and exhibits intelligence and earnestness. There is nothing in the record to show that any of them committed perjury. No adequate reason is given by the majority for discrediting any part of their vital testimony. On the contrary, nearly all of the findings of the majority are founded upon it, the writings produced by them and the stipulations; and the opinion of the majority indicates that at least some of the testimony of the petitioner may have been considered plausible on the issues in respect to which fraud is here found.

If the theory of the respondent as to the facts in this proceeding is correct, then petitioner's wife and other credible witnesses, his friends and associates, were guilty of some elements of fraud, and petitioner deliberately involved her and them in the committing of fraud. Upon the whole record this is incredible.

There is much that is commendable of petitioner in the record as heretofore revealed herein and by the majority. He was in 1929 a member of the board of directors, and of the executive committee thereof, of the Federal Reserve Bank of New York. He not only had the confidence of the community in which he lived to an unusual degree, but he was highly regarded elsewhere. He dauntlessly stepped into and, to the extent possible, saved a critical situation on October 29, 1929, against the advice of a friend and associate. That was
208 the beginning of his reverses financially. He did this to support the market for the stock of his bank, the outstanding shares of which totaled 5,000,000, of which he owned but 35,000, after the National City Co., owned by all the stockholders of the bank, had exhausted its capacity to do more in this respect. If he had not done this there might have been a dumping of the stock of the bank coupled with a run on the deposits; and the bank might have been wrecked. He stayed with it all down to the end of the record in this proceeding. Notwithstanding that his large fortune was gone and he was insolvent by $3,000,000, he was not dismayed and he remained true to his creditors and all those who put confidence in his integrity. There is no evidence that he was even asking any consideration from his creditors. A man of that type is not apt to commit fraud, as charged here; and upon the whole record, and the applicable law, he should not be penalized for fraud as found and held by the majority. Too, the fact that he repurchased the stock from his wife is commendable. He had represented the stock to her for a good investment. It proved disastrous to her. He saved her practically whole and thereby relieved her of anxiety and embarrassment as he should have done. There is no correct test that requires that a husband do differently, notwithstanding the rule that requires close scrutiny of their transactions in question here. The fact that he became insolvent should not be permitted to militate against his repurchase. A man that could make $30,000,000 as he did can retrieve himself. It is common knowledge that this sort of thing has been done often.
209 The findings of the majority quote from the testimony a portion of what was testified to upon the subject of what was

said at the annual meeting of the stockholders of the National City Bank early in 1930 touching upon the subject of the sale of his bank stock. Petitioner does not deny that he made such a statement and it appears that he was then talking about his permanent investments of his own money in such stock, of which he then had 35,000 shares, which he did not sell. The incident is fully and satisfactorily explained by undisputed proof. It is obvious that he parried the question in so far as it touched the 28,300 shares which he had bought temporarily to protect the bank and the National City Co. If he had stated that he had recently bought and sold 28,300 shares to that comparatively large and somewhat panicky meeting of stockholders, it might have proved disastrous. Other evidence could have been set forth in the findings which would, with justification, account for what was said. He had told directors and others about the purchase and sales of the 28,300 shares. Early in 1931 he told his personal counsel about the sale to his wife when he gave him information for the basis of his last will and testament.

Other evidence favorable to the petitioner on all other subjects could be fully pointed out and quoted in support of all of the conclusions here reached.

For the numerous reasons hereinbefore set forth, I respectfully dissent from the findings and holdings of the majority to the effect that the petitioner has been proven guilty of fraud by clear and convincing evidence.

All of the conclusions herein set forth are based on the undisputed proof in the record.

210 In view of the conclusions herein reached, it is unnecessary to further consider any of the other phases of the questions presented by the parties or suggested by the record, except to state that I agree with the majority that the filing of petitioner's reply was properly allowed.

Dissenting opinion

SMITH, dissenting: I am of opinion that the acquittal by a jury of the petitioner of the charge of fraud in filing income tax returns for the tax years here in question is a complete bar to a finding by this Board of fraud in the filing of those returns. Coffey v. United States, 116 U. S. 436.

Before United States Board of Tax Appeals

Docket No. 74,720

CHARLES E. MITCHELL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the findings of fact and opinion of the Board, promulgated August 6, 1935, the respondent herein having on August

27, 1935, filed a notice of settlement and proposed recom-
211 putation of tax, and the petitioner having on September 17, 1935, filed an acquiescence in said recomputation, now, therefore, it is

Ordered and decided: That there is a deficiency in income tax of $728,709.84 and a penalty of $364,354.92 for the year 1929, and that there is no deficiency for the year 1930.

Entered Sep. 20, 1935.

[SEAL] (s) ERNEST H. VAN FOSSAN, *Member.*

In the United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Petition for review

Filed Dec. 4, 1935

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioner respectfully shows to this Honorable Court as follows:

212 I

Jurisdiction for Review

A. This is a proceeding for a review by the United States Circuit Court of Appeals for the Second Circuit, of a Decision of the United States Board of Tax Appeals entered on September 20, 1935, and redetermining a deficiency in income taxes and imposing a penalty for the calendar year 1929, as follows:

Deficiency in tax	$728,709.84
50% fraud penalty	364,354.92
Total deficiency	$1,093,064.76

B. Your petitioner, at the time of filing this petition, is and always has been a native born citizen of the United States; and is, and at all times herein referred to, has been an inhabitant of the City of New York, State of New York.

For each of the calendar years 1929 and 1930, petitioner made his income tax return to the Collector of Internal Revenue for the District of New York, Third Division, whose office is located in the City of New York, State of New York.

II

Statement of the Nature of the Controversy

1. On December 8, 1933, respondent determined a deficiency in tax against petitioner, plus a 50% fraud penalty for the years
213 1929 and 1930, in the total sum of $1,275,644.52. This tax

was computed by adding to petitioner's 1929 income alleged additional compensation of $666,666.67 and disallowing a loss on the sale of 18,300 shares of National City Bank stock to petitioner's wife, Elizabeth R. Mitchell, of $2,872,305.50. (Other losses in the sum of $3,668.40 were disallowed and a credit of $27,460.90 was given on dividends.) On the basis of these adjustments respondent computed a tax of $728,709.80 for which a 50% fraud penalty of $364,354.92 was added. For the year 1930 a deficiency in tax was computed by disallowing a loss of $758,918.28 on the sale by petitioner of 8,500 shares of Anaconda Copper Mining Company stock and, after certain adjustments with respect to dividends and interest, a net income was computed of $624,637.89 on which a tax of $121,719.84 and a 50% fraud penalty of $60,859.92 was assessed.

2. On January 19, 1934, petitioner filed his petition for a redetermination of said deficiencies and penalties. The petition alleged in substance:

(a) The loss of $2,872,305.50, resulting from the sale of said 18,300 shares of National City Bank stock to Mrs. Mitchell, constituted a deductible loss.

(b) The sum of $666,666.67 received by petitioner from The National City Company on or about July 1, 1929, did not constitute taxable income for the year 1929.

(c) The loss of $758,918.25 upon the sale of 8,500 shares of Anaconda stock constituted a deductible loss for the year 1930.

214 (d) The assessment and collection of all or any part of the additional taxes and penalties for the years 1929 and 1930 were barred by the Statute of Limitations under Section 275 of the Revenue Act of 1928, not having been made within two years from the date of filing petitioner's income tax returns for said years.

(e) Petitoner did not file a false or fraudulent return with intent to evade tax either for the year 1929 or the year 1930.

(f) The question as to whether petitioner filed a false or fraudulent return with intent to evade tax for either of the years 1929 and 1930, and all the material issues necessary for a determination thereof, were tried in the criminal action entitled United States of America v. Charles E. Mitchell, in the United States District Court for the Southern District of New York; and the determination and adjudication thereof in petitioner's favor constituted a full and final determination and adjudication of all such issues and barred the assessment and collection of the alleged deficiencies or any part thereof and the 50% fraud penalties thereon.

(g) The assessment and collection of all or any of said additional taxes and penalties for the years 1929 and 1930 would violate petitioner's constitutional rights and subject him to double jeopardy.

3. The petition further alleged, in substance:

(a) That the sale of said 18,300 shares of bank stock to his
215 wife on December 20, 1929, was, and was intended to be, a genuine and bona fide sale and was made by petitioner after having been advised by counsel that the loss sustained thereon could

be legally deducted from petitioner's 1929 gross income; that the loss reported in the sum of $2,872,305.50 was the difference between the cost of said 18,300 shares to petitioner and the sale price to Mrs. Mitchell which was the current market price at the time of the sale; and that pursuant to, and relying upon, the advice of counsel, petitioner deducted said loss in computing his net income as reported in his 1929 income tax return, and filed said return accordingly.

(b) That said sum of $666,666.67 was received by petitioner about July 1, 1929, as a distribution on account of whatever he might be entitled to receive for the year 1929 from the Management Fund of The National City Company, which fund was a profit-sharing fund created by resolutions of its Board of Directors; that in the latter part of 1929, as a result of the sharp decline in the market prices of securities, The National City Company suffered severe losses which wiped out the profits for that year and left no money available for the Management Fund for that year; that the Company, confronted with this situation, had each participant in the Management Fund acknowledge that the July 1929 distribution was an overpayment and was to be repaid to the Company out of future distributions from the Management Fund; that counsel for the Company considered the legal character of such distribution, and advised the Company
216 that the July 1929 distribution did not constitute income paid to employees, and advised petitioner that it did not constitute taxable income to him; and that, pursuant to and relying upon such advice of his counsel, petitioner did not include said sum of $666,666.67 in his gross income in computing his 1929 income tax return.

(c) That the sale of 8,500 shares of Anaconda Copper Mining Company stock to William B. Thornton, on December 26, 1930, was an absolute and unconditional sale, with no contract, option, or agreement to repurchase the same; and that a loss of $758,918.25 was realized thereon, which was deducted by petitioner from his gross income in preparing his 1930 income tax return.

(d) That petitioner was indicted for fraudulently attempting to evade income taxes for each of the years 1929 and 1930, by filing false income tax returns with intent to evade tax; that he was tried before a jury upon the issues of whether the failure to include, as an item of income, the sum of $666,666.67, and the taking of the losses resulting from the sale of 18,300 shares of National City Bank stock in 1929, and of 8,500 shares of Anaconda stock in 1930, were false or fraudulent with intent to evade tax; that petitioner was acquitted of every charge made against him; that under said indictment the judge's charge and all the issues raised therein, such acquittal constituted a final adjudication in petitioner's favor of the material issues before the Board of tax Appeals; and that respondent was barred from assessing or collecting any tax based upon charges of fraud
217 with intent to evade tax for the calendar years 1929 and 1930.

(e) That petitioner could not be subjected again to charges for which another penalty was prescribed by statute.

4. On March 8, 1934, respondent filed his answer, denying, in substance, that petitioner did not omit the item of $666,666.67 or deduct the losses sustained on the sale of said 18,300 shares of bank stock in 1929, and of the 8,500 shares of Anaconda stock in 1930, fraudulently or with intent to evade tax; and alleging that no sale was made by petitioner as alleged, of 18,300 shares of National City Bank stock, and that no loss of $2,875,304.50, or any other amount, was sustained by petitioner on said sale; that this deduction, together with the omission of the sum of $666,666.67 from his 1929 income tax return was an understatement of income wilfully and fraudulently made with intent to evade tax; that as to 1930, no sale of 8,500 shares of Anaconda stock was made by petitioner and no loss in the sum of $758,918.25 was sustained, and that the deduction from said income constituted an understatement of income wilfully and fraudulently made with intent to evade tax; that in the year 1930, petitioner failed to report the sum of $54,900, received by him as dividends on 18,300 shares of said bank stock and the same was done wilfully and fraudulently with intent to evade tax; that petitioner's income tax returns for each of the calendar years 1929 and 1930 were false and fraudulent, and made with intent to evade
218 tax; and that no statute of limitations was applicable to the assessment or collection of the tax due from petitioner for either of said years under the provisions of Section 276 of the Revenue Act of 1928.

5. Pursuant to leave granted by the Board of Tax Appeals on August 6, 1934, petitioner then filed a reply nunc pro tunc joining issue upon all the affirmative allegations in the answer.

6. The cause thus at issue duly came on for hearing and was heard before a special division of said Board[1] from April 30 to May 4, 1934, inclusive, during which period petitioner and respondent submitted proof in support of their respective allegations. Thereafter, on August 6, 1935, findings of fact and an opinion by Member Van Fossan (reviewed by the Board) were promulgated, in which it was held that petitioner filed a false and fraudulent tax return for the year 1929, with intent to evade tax, and that a deficiency in tax existed which, in whole or part was due to fraud with intent to evade tax, and sustained the deficiency as determined in the 60-day letter of December 8, 1933, as to the calendar year 1929; that respondent had proved by clear and convincing evidence that the 18,300 share transaction between petitioner and his wife was a sham for the fraudulent purpose of evading taxes; that the omission of the sum of $666.666.67 was fraudulent and with in-
219 tent to defraud the Government of taxes; that for the year 1930 petitioner's failure to return dividends on the 18,300 shares of National City Bank stock paid to and received by Mrs. Mitchell should have been reported by petitioner and his failure so to do was

[1] Members Jed C. Adams, W. C. Lansdon, and Ernest H. Van Fossan. After the trial, but before any briefs were filed, W. C. Lansdon's term of office expired on June 2, 1934, and he was not reappointed. On January 29, 1935, Jed C. Adams died.

false and fraudulent with intent to evade tax; that the sale of the 8,500 shares of Anaconda stock in 1930 was bona fide and lawful, and that petitioner was entitled to deduct the loss so sustained; and that the indictment and acquittal of petitioner in the Federal District Court did not stand as a bar to any decision in the proceeding before the Board. It was also held that the burden of proving fraud rested upon the Government and that the permission given to petitioner by the division of the Board to file a reply nunc pro tunc was a proper exercise of its discretion. On September 20, 1935, the Board entered its final decision approving the deficiency as determined by the respondent for the year 1929, in the sum of $728,709.84, and a penalty of $364,354.92, and finding that there was no deficiency for the year 1930.

Two members of the Board (McMahon and Smith) wrote dissenting opinions. These two members dissented from the decision of the majority which held the sale of the 18,300 shares to Mrs. Mitchell fraudulent with intent to evade tax—one member (McMahon) upon the ground that the sale was not fraudulent and upon the additional ground that the acquittal by the jury on the charge of fraud was a complete bar to any finding thereof by the Board, and one member (Smith) solely upon the latter ground. As to
220 the omission to report the sum of $666,666.67, six members (Black, Trammell, Arundell, Leech, McMahon, and Smith) dissented, five members holding that the evidence did not establish fraud as to that item, one member (Smith) on the ground that the jury's acquittal was a bar to a finding of fraud, and one member (McMahon) upon both grounds. All members concurred that petitioner's sale of 8,500 shares of Anaconda stock in 1930 was in good faith and free from fraud.

III

Assignments of Error

As a basis for review, petitioner makes the following assignments of error:

I. The Board erred in ordering, finding, and deciding petitioner subject to a deficiency income tax of $728,709.84 and a 50 percent fraud penalty of $364,354.92 for the year 1929.

II. The Board erred in finding that petitioner filed a false and fraudulent income tax return for the year 1929, with intent to evade tax, and that a deficiency in tax existed, which in whole or part was due to fraud with intent to evade tax, in that respondent failed to prove the same by clear and convincing evidence.

III. The Board erred in concluding from the facts as found in the "Findings of Fact" and opinion that respondent had proved by clear and convincing evidence that petitioner filed false and fraudulent income tax returns for the years 1929 and 1930
221 with intent to evade tax, and that a deficiency in tax existed for the year 1929 which was due to fraud with intent to evade

tax, since such facts were not inconsistent with an intention on petitioner's part to file honest and correct income tax returns for each of said years.

IV. The Board erred in failing to hold that the facts as found in the "Findings of Fact" and opinion did not constitute clear and convincing evidence that petitioner filed false and fraudulent income tax returns for the years 1929 and 1930, or either of them, with an intent to evade tax and that a deficiency for tax for 1929 existed which was due to fraud with intent to evade tax.

V. The Board erred in holding that respondent is lawfully entitled to assess, and in failing to hold that respondent is barred from assessing, any additional income tax against petitioner for the calendar year 1929, after more than two years elapsed since the filing of petitioner's income tax return for said year.

VI. The Board erred in holding that the verdict of the jury in the criminal action for evasion of income taxes, entitled United States of America v. Charles E. Mitchell, tried in the United States District Court for the Southern District of New York, in May and June 1933, did not adjudicate and determine in favor of petitioner all the material issues of fact involved in the proceeding before the Board; and that it did not constitute a previous adjudication
222 binding upon the parties hereto of the material facts in issue in said proceeding in favor of petitioner.

VII. The Board erred in holding that the jury's verdict of acquittal in the said criminal action did not constitute a previous adjudication between the parties of all matters involved in the proceeding before the Board, and did not estop and bar the Board from determining that petitioner had filed a false or fraudulent income tax return for the year 1929, with intent to evade tax.

VIII. The Board erred in failing to find, in substance, that the jury's verdict of acquittal in said criminal action was a determination and adjudication that, in deducting a loss of $2,872,305.50 and in not including the sum of $666,666.67 as income in petitioner's 1929 income tax return, petitioner did not act fraudulently with intent to evade income tax, because such fact was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

IX. The Board erred in failing to find, in substance, that the jury's verdict of acquittal in said criminal case was a determination and adjudication that the transaction of December 20, 1929, between petitioner and Mrs. Mitchell, was not a sham or a pretense; but was intended by them to be and was a genuine and valid sale of the 18,300 shares of National City Bank stock, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

223 X. The Board erred in failing to find, in substance, that the jury's verdict of acquittal in said criminal case was a determination and adjudication that the petitioner honestly believed

that the July 1929, Management Fund distribution of $666,666.67 was not taxable income for the year 1929, and that he was not required to report the same in his 1929 income tax return, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XI. The Board erred in holding that petitioner's resolution in doubtful matters against the Government indicated a wrongful and fraudulent intent on petitioner's part to evade income taxes.

XII. The Board erred in holding that petitioner was not legally entitled to resolve all doubtful questions in his own favor in preparing and filing his income tax return for the year 1929, without violating Section 293B of the Revenue Act of 1928, and in failing to hold, in substance, that he was legally entitled so to resolve such doubtful questions.

XIII. The Board erred in holding that respondent had proved, and in failing to hold that respondent had not proved, by clear and convincing evidence that the sale of 18,300 shares of National City Bank stock on December 20, 1929, by petitioner to his wife, Elizabeth R. Mitchell was a sham, conceived and carried out for the
224 fraudulent purpose of evading taxes, and that petitioner sustained no loss on the transaction, for the reason that respondent had failed to prove the same by clear and convincing evidence.

XIV. The Board erred in failing to find, in substance, that, in taking deductions on his 1929 income tax return of $2,872,305.50, petitioner did so in good faith relying upon advice of counsel and without any intent to fraudulently evade an income tax, because such fact was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XV. The Board erred in holding that the omission of the Management Fund item of $666,666.67 from petitioner's income tax return for 1929 was fraudulent and due to an intention to defraud the Government of taxes, because the same was not supported by any evidence but was contrary to the evidence adduced before the Board.

XVI. The Board erred in failing to find, in substance, that petitioner relied upon the advice given to him by his counsel, Garrard Winston, that the $666,666.67 payment received by him was not part of petitioner's 1929 income and was not returnable in his income tax return for that year as such and that petitioner, in so relying and in so acting, was not guilty of fraud with intent to evade tax.

As a further basis for review, petitioner makes the following more detailed assignments of error:

XVII. The Board erred in holding, and in basing its deci-
225 sion in part upon, each of the matters hereinafter itemized in that each of said items was not supported by any evidence, and was contrary to the evidence adduced before the Board. Such matters, nine in number are as follows:

1. That the sale from petitioner to Mrs. Mitchell did not rest upon a genuine intention to dispose of his property without reservation or evasion of mind.

2. That the record does not sustain the contention that petitioner sought legal advice, intending to rely thereon.

3. That the elements which counsel advised petitioner were necessary requirements for a valid sale, were not present in the transaction between petitioner and Mrs. Mitchell.

4. That petitioner did not reveal to counsel all of the necessary facts to enable counsel to advise petitioner as to the legality of the sale to Mrs. Mitchell.

5. That counsel did not with full knowledge of the facts attempt or purport to advise petitioner that the sale was valid, and would enable petitioner to deduct the loss incurred thereby, in computing his income tax for 1929.

6. That counsel suggested doubt as to the proposed sale.

7. That petitioner did not choose to follow the advice that was given by counsel.

226 8. That petitioner determined to follow his usual practice and exchange letters with his wife, although counsel told him that a very carefully drawn agreement was necessary.

9. That petitioner had chosen his course of action and proceeded to follow it, notwithstanding the precautionary advice of counsel.

XVIII. The Board erred in holding that, because of all or any of the following facts found by it, respondent had proved by clear and convincing evidence that the 18,300 share transaction between petitioner and his wife was a sham, conceived and carried out for the fraudulent purpose of evading taxes, each and every of said facts being entirely consistent with a bona fide intent to effect a genuine and valid sale. The facts so found were:

1. That "at the time of the alleged sale Mrs. Mitchell's total resources amounted to less than one million dollars."

2. That "the sale price of the stock approximated four million dollars."

3. That "the total amount of cash in Mrs. Mitchell's hands consisted of some thirty-two thousand dollars."

4. That "the 'interest' due the petitioner on account of the alleged sale amounted to approximately one hundred ninety-six thousand dollars per year."

5. That "the dividends on the stock amounted to but seventy-three thousand two hundred dollars per year."

227 6. That "the difference between these sums was furnished by petitioner to his wife who, in turn, paid the same and all money received as dividends to the petitioner."

7. That "the stock was all pledged to secure a large loan to Morgan & Co.; therefore no delivery was made or was possible."

8. That "though advised to notify Morgan & Co. of the alleged sale petitioner did not do so."

9. That "though advised that Internal Revenue stamps were required, no stamps were affixed."

10. That "no bill of sale was executed."

11. That "no payment on account of principal was ever made."

12. That "there was no entry by Mrs. Mitchell on her books of any indebtedness to petitioner."

13. That "although Mrs. Mitchell claims to have bought in order to re-sell at a profit, she did not sell although the market improved to such an extent that she could have sold at a profit of three quarters of a million dollars, thereby nearly doubling her fortune."

14. That petitioner made "efforts to have the National City Co. recognize the validity of his claim for relief and assume his obligations on the stock" and that "he did not reveal to his business
228 associates during these negotiations the alleged disposition of the stock or suggest that the claim had been sold to his wife."

15. That "though the market had fallen to forty-five dollars per share, the price at which petitioner 're-acquired' the stock was two hundred twelve dollars per share, the price at which Mrs. Mitchell was alleged to have bought" and that "this transaction occurred at a time when petitioner was insolvent to an amount of three million dollars."

XIX. The Board erred in holding that petitioner deemed himself the owner of the 18,300 shares of bank stock at all times, on the ground that such holding was not supported by any evidence, but was contrary to the evidence.

XX. The Board erred in failing to find, in substance, each and all of the following facts because each was material and necessary to a proper disposition of the issues and each was supported and required by the uncontradicted evidence:

1. That petitioner acquired the 18,300 shares of National City Bank stock here involved on October 29, 1929, when he lent his personal support in the market for National City Bank stock, by purchasing with his own funds 28,300 shares with an understanding with The National City Company that it would endeavor to relieve him of such shares by sale thereof as soon as possible. Said shares were not purchased for permanent investment but only to relieve temporarily a situation created by the severe stock market decline in the latter part of October 1929.

229 2. That upon the failure of National City Company to sell the remaining 18,300 of the said 28,300 shares, petitioner, on or before December 19, 1929, concluded that he must sell the same, so that the loss sustained upon such a sale might be taken as a deduction for tax purposes from his 1929 gross income.

3. That in considering the sale, petitioner in his own mind weighed the following features:

(a) That a sale by him of those 18,300 shares in the open market might have seriously depressed the market price below the price at which the employees of The National Cit Bank and its affiliated companies had recently subscribed for stock under an employees' stock subscription plan;

(b) That a sale in the open market of 18,300 shares by the chief officer of the bank might have had an adverse effect on the bank, and on its standing with its depositors;

(c) That Mrs. Mitchell in the past had owned National City Bank stock and had expressed regret at parting with that stock;

(d) That those 18,300 shares of National City Bank stock were being carried at J. P. Morgan & Company as part of a greater number of shares and under a loan which was amply secured;

(e) That petitioner expected that stock to recover soon in price; and

230 (f) That a sale to Mrs. Mitchell would be free from the objections which would make a sale in the open market undesirable.

4. That on December 19, 1929, petitioner and his wife agreed that, if he were advised by counsel that a sale to Mrs. Mitchell would allow petitioner to deduct the difference between the price he had paid for the stock and its then current market value, from his 1929 gross income for income tax purposes, Mrs. Mitchell would buy the 18,300 shares.

5. That on December 20, 1929, petitioner consulted Harry W. Forbes, a member and tax specialist in the New York law firm of Shearman & Sterling.

6. That petitioner told Forbes that he was contemplating a sale of the 18,300 shares of National City Bank stock to his wife; that the stock was pledged with J. P. Morgan & Company with other stock as collateral for a loan; that the stock so to be sold would be left in pledge with J. P. Morgan & Company; that Mrs. Mitchell was not going to make any cash payment on the shares; that it was expected that the purchase price, or a large portion thereof, could be paid through sales of stock at prices in excess of $220 per share; and that he asked Forbes' opinion as to whether such a sale to Mrs. Mitchell would allow petitioner to deduct the loss sustained thereby in computing his 1929 income tax.

7. That Forbes understood that petitioner was so consulting him as an attorney to secure a legal opinion upon which petitioner intended to act.

231 8. That Forbes advised petitioner that a valid sale could be made to Mrs. Mitchell, although the stock continued to remain pledged, and without any delivery thereof to her on any present cash payment by her, and that such a transaction would establish a loss on the stock, deductible from petitioner's 1929 income.

9. That the opinion of Forbes was given honestly and in good faith.

10. That petitioner relied upon the advice of Forbes that the transaction accomplished by the letter of December 20, 1929, from petitioner to Mrs. Mitchell, the letter of the same date from Mrs. Mitchell to petitioner, and the letter of the same date from petitioner to Taff & Company, would allow petitioner lawfully to deduct the loss on the 18,300 shares from his gross income for tax purposes.

11. That said letters of December 20, 1929, were partly prepared and were approved by Forbes, and that such letters were used rather than a formal agreement because of a custom, extending over many years between petitioner and Mrs. Mitchell, to conduct their business transactions by exchange of letters.

12. That the calculation of the amount of stock transfer stamps was complicated because of the interest of The National City Company, which attached to the shares of the National City Bank; that in the ordinary course of events the calculation would have been made by the Stock Transfer Department of The National City Com-
232 pany, and would have taken some time; and that the failure to place such stamps upon the letters of December 20, 1929, was an oversight on petitioner's part at a time when business was upset and he was greatly disturbed and under a heavy strain because thereof.

XXI. The Board erred in failing to find, in substance, that on or before December 20, 1929, Mrs. Mitchell knew of the facts and circumstances surrounding petitioner's acquisition of those 28,300 shares, the disposition of 10,000 shares thereof, and the shrinkage in value of the remaining 18,300 shares, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXII. The Board erred in failing to find, in substance, that on or before December 20, 1929, Mrs. Mitchell had been urged to purchase National City Bank stock by her brother, Joseph Rend; and that Mrs. Mitchell had great confidence in petitioner's judgment and business ability and in National City Bank stock, and knew not only of the employees' over-subscription, but also that those 18,300 shares were pledged with J. P. Morgan & Company, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXIII. The Board erred in failing to find, in substance, that Mrs. Mitchell believed the sale of those 18,300 shares to her by petitioner was absolute and unconditional, and that she intended to be-
233 come the actual purchaser of said shares, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXIV. The Board erred in failing to find, in substance, that Mrs. Mitchell did not purchase the stock with an intent to aid or abet, or to conspire with, petitioner to enable him to evade the payment of an income tax lawfully due, because such fact was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XXV. The Board erred in failing to find, in substance, that there was no evidence of any fraudulent intention on the part of Mrs. Mitchell, or of any intention on her part other than to make a genuine and bona fide purchase of the said 18,300 shares of bank stock and to hold that the sale of said shares by petitioner to Mrs. Mitchell must be regarded as valid and genuine, regardless of any purpose or

intention petitioner may have had in making the sale, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXVI. The Board erred in failing to find, in substance, that neither on December 20, 1929, nor at any time thereafter until March 1932, did Mrs. Mitchell contemplate transferring those 18,300 shares to petitioner; that Taff. & Company, the record owner of those 18,300 shares, sent to the Bureau of Internal Revenue from
234 time to time, as required by law, during the period from December 20, 1929, to March 24, 1932, ownership certificates on Treasury Form 1087, declaring the actual owner of those 18,300 shares to be Mrs. Mitchell and reciting the record owner to be Taff & Company, and that the dividends on the 18,300 shares were received and paid over to Mrs. Mitchell, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXVII. The Board erred in failing to find, in substance, that in the spring of 1930, petitioner reminded Mrs. Mitchell that, as the market price of the stock had risen to about $250 a share, she had a large profit thereon; that Mrs. Mitchell did not want to sell any of the stock at that time because she felt it was going higher, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXVIII. The Board erred in failing to find, in substance, that Mrs. Mitchell, between December 20, 1929, and March 24, 1932, paid interest on the purchase price of the 18,300 shares owing from her to petitioner; and that on or about April 1, 1930, certain of Mrs. Mitchell's securities were sold to raise money to meet such interest charges, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXIX. The Board erred in failing to find, in substance,
235 that petitioner did not authorize or request the statement appearing at the bottom of the memorandum dated October 2, 1931 (set forth in the Board's Finding of Fact 23), "Difference to Mrs. Mitchell, $33,478.18", because such fact was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XXX. The Board erred in failing to find, in substance, that the sale of those 18,300 shares by petitioner to Mrs. Mitchell on December 20, 1929, was intended by petitioner to be an absolute and unconditional sale, and not a sale under the pretense to avoid income tax, because such fact was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XXXI. The Board erred in failing to find, in substance, that the letter of December 20, 1929, from Mrs. Mitchell to petitioner, and copies of the letters from Mr. Mitchell to Taff & Company of that date, were shown to the examining agent of the Internal Revenue

Bureau when petitioner's 1929 return was being examined, by the Agent in 1931, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXXII. The Board erred in failing to find in regard to petitioner's repurchase of the 18,300 shares on March 24, 1932, in substance, as follows:

1. That the petitioner was advised by his attorneys that he
236 was legally entitled to repurchase the shares without affecting the validity of the original sale on December 20, 1929, and without affecting petitioner's right to have deducted the loss sustained thereon from his 1929 gross income for tax purposes.

2. That petitioner was advised by his attorneys that he could purchase said shares at the price at which he sold them to Mrs. Mitchell on December 20, 1929, and that the difference between the then market price and $212 per share might represent a gift.

3. That the advice so given petitioner by the New York law firm of Cravath, deGersdorff, Swaine & Wood and by Robert T. Swaine of that firm was based upon their independent investigation of the facts, and that said advice was given in good faith.

4. That petitioner followed in good faith and acted on that advice of his counsel in making the repurchase of those 18,300 shares on March 24, 1932, and acted in the manner and followed the procedure prescribed by his attorneys in making such repurchase.

5. That there was no intent on the part of said attorneys to aid, abet, or conspire with petitioner to enable him to evade an income tax, and they knew he was seeking their advice, as attorneys, and that he was going to act upon it.

6. That petitioner did not have any agreement with Mrs. Mitchell at
237 any time for the repurchase of the stock; and at no time prior to 1932 did petitioner have any thought of repurchasing the shares.

Because each of such facts was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XXXIII. The Board erred in failing to find, in substance, that the letter of March 5, 1932, delivered by petitioner to the Board of Directors of The National City Company, was prepared by and sent under the advice of Cravath, deGersdorff, Swaine & Wood, petitioner's attorneys, who had advised in regard to the repurchase of the 18,300 shares; and that petitioner acted in good faith in conformity with such advice of his counsel, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXXIV. The Board erred in failing to find, in substance, that Harry W. Forbes, Guy Cary, Garrard Winston and Robert T. Swaine were eminent attorneys and that Shearman & Sterling and Cravath, deGersdorff, Swaine & Wood were eminent law firms in the City of

New York; that their reputation was not in question in this proceeding; and that the advice so given by each of them to petitioner was given honestly and in good faith and based upon their best judgment as attorneys, because such facts were material and necessary to a proper disposition of the issues and were required and supported by uncontradicted evidence.

XXXV. The Board erred in failing to hold, in substance,
238 that the events which occurred subsequent to March 15, 1930, had no relevancy or materiality in determining whether petitioner was motivated by a fraudulent intention to evade the income tax in deducting from his net income for 1929 for income tax purposes said sum of $2,872,305.50.

XXXVI. The Board erred in finding, and in basing its decision in part upon, each of the matters hereinafter enumerated, because each thereof was not supported by any evidence, but was contrary to the evidence adduced before the Board. Such matters are the following:

1. That the various conferences held in December 1929, concerning the status of the Management Fund and the payments therefrom were initiated by petitioner.

2. That the conferences with counsel and other officers of The National City Company, respecting the possibility of repayment, the signing of the receipts, the corporate action and the making of book entries, were largely at petitioner's initiation, and followed his own decision that the payment should not be considered as income.

3. That the facts set forth in paragraph XXXVI (2) above were subsequently conceived and sprang into existence in support of petitioner's determination already arrived at; that they suggest the employment of deliberate artifice to give color to petitioner's action in
not reporting the July 1929 Management Fund payment for
239 taxation; and that such facts were "mere gestures lacking in the spark of reality that distinguished the genuine from the pretended."

4. That petitioner's tax accounting for 1929 was characterized by an apparent indifference to the right of the Government to receive its toll in the form of taxes, and that all doubts therein were resolved by him against the Government.

5. That the signing of the receipts, or the making of entries on the books of The National City Company, characterizing payment as an overpayment and subject to repayment out of future earnings, did not alter the taxable character of the payment of $666,666.67, received by petitioner, but that the taxability of said amount was fixed at the time of payment.

6. That the fact that the sum of $50,515.53 received by petitioner on January 2, 1931, out of the 1928 Management Fund, and the fact that the obligation of the recipients to pay was written down on the books of The National City Company to $1, were relevant or material to the issue of whether petitioner was guilty of fraud or a fraudulent intention to evade income tax for the calendar year 1929.

7. That the findings of fact as found by the Board, numbers 42-48, inclusive, are relevant or material to the issue of whether petitioner was guilty of fraud or fraudulent intention to evade income tax for the calendar year 1929.

XXXVII. The Board erred in failing to find, in substance, each and all of the following facts, because each was material and
240 necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence. Such facts are the following:

1. That because of the losses realized by National City Company in November and December 1929 (which losses exceeded the profits which had been made during the first ten months of that year), there were no profits from which any Management Fund distribution for that year could be made under the Management Fund plan.

2. That in December 1929, some of the recipients of the July 1929 Management Fund distribution were not financially able to repay the amount thus received from The National City Company; and that in the interest of the morale and efficiency of The National City Bank, the Board of Directors considered that it was unwise to make any distinction between the different recipients, based upon ability to repay, or to attempt to collect from some and not from others.

3. That the directors present at the December 30, 1929, meeting of directors of The National City Company were Garrard Winston, James H. Perkins, James A. Stillman, Beekman Winthrop, E. P. Swenson, Gordon Rentschler and petitioner; that such directors were distinguished bankers, well known in the community, and men of large affairs in the business world; and that none of them, save Rentschler and petitioner, had received any part of the July
241 1929 distribution, or were participants in the Management Fund, or had any personal or financial interest therein.

4. That the action taken by the directors at the December 30, 1929, meeting, with respect to the July 1929 Management Fund distribution, was in the exercise of their best judgment and was what they thought was for the interest of the company; and that it was not part of a scheme to enable the petitioner or anyone else to evade any income tax lawfully due.

5. That counsel advised that the July 1929 Management Fund distribution was not chargeable to operating expenses of the company for that year; and that, acting under such advice, said Company did not charge said distribution to operating expenses or report said distribution to the Internal Revenue Bureau as part of the compensation paid to each recipient for that year.

6. That Garrard Winston, acting as counsel for The National City Company, honestly, in good faith, and after due reflection, advised petitioner that the $666,666.67 distribution of July 1929 should not be reported in his income tax return for 1929 as part of his income for that year.

7. That Garrard Winston, as a director of The National City Bank and as its counsel, was familiar with all of the facts and circum-

stances pertaining to the July 1929 Management Fund distribution, and with the subsequent action of the directors taken at a
242 meeting on December 30, 1929, when he gave petitioner such advice referred to in the last previous paragraph hereof.

8. That prior to giving such advice, Garrard Winston and his partner, Harry W. Forbes, conferred upon the law pertaining to the taxability of the July 1929 Management Fund distribution, including a ruling of the Internal Revenue Bureau IT2043.

XXXVIII. The Board erred in failing to find and hold, in substance, that the law as it existed prior to March 15, 1930, as to whether petitioner was required to include in his gross income for income taxes the July 1, 1929 Management Fund distribution of $666,666.67 was not settled, and petitioner was justified in not including this item and not guilty of a fraudulent intent to evade income tax in an omission thereof, because such fact was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XXXIX. The Board erred in failing to hold, in substance, that the statement of Garrard Winston which the Board found in its Finding of Fact No. 41 to have been made in January 1930, that "he (Winston) and Forbes had come to the conclusion that the mid-year payment made out of the Management Fund was, as the result of the action of the Board at its September 30 meeting, not a proper deduction for the National City Co. to take from its income tax return; that the Company should not report those payments as compensation to officers; and that it followed, from the fact that
243 it was not a deduction from the Company income, it was not income to the petitioner" exonerated petitioner as a matter of law of any fraudulent intention to evade income tax in omitting this item, because each of such facts was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XL. The Board erred in failing to hold, in substance, that the events which occurred subsequent to March 15, 1930, had no relevancy or materiality in determining whether petitioner was motivated by fraudulent intention to evade income tax in failing to include in his gross income for 1929 for income tax purposes the July 1, 1929 Management Fund distribution of $666,666.67, because such fact was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XLI. The Board erred in failing to find, in substance, that the indictment returned against the petitioner by a grand jury of the District Court of the United States for the Southern District of New York charged, among other things, each and all of the following:

1. The petitioner wilfully, feloniously, fraudulently, and knowingly, and with intent to evade and defeat an income tax for 1929, on $728,709.84, asserted that he had suffered a loss from the sale of

real estate, stocks, bonds, etc., in the sum of $1,484,067.53, whereas it was claimed by respondent that petitioner had a profit in the sum of $1,391,906.37.

244 2. That petitioner had a gross income for 1929 of $1,872,861.69 from salaries and other compensations instead of the sum of $1,206,195.02 as returned.

3. That the alleged discrepancies in petitioner's return resulted from two items: (a) the deduction of $2,872,305.50 as a loss sustained upon the sale of 18,300 shares of stock of The National City Bank, and (b) the non-inclusion of the sum of $666,666.67 received by petitioner from the Management Fund and July 1, 1929, because that fact was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XLII. The Board erred in failing to find, in substance, that upon the criminal trial, evidence was offered by the Government and received in support of each of the charges of the indictment, and offered by the defendant in opposition to each of such charges; and that the material matters in issue in said criminal action were presented to the jury and determined by it in petitioner's favor, and were the same as the material matters in issue in the proceeding before the Board, because each of the facts was material and necessary to a proper disposition of the issues and was required and supported by uncontradicted evidence.

XLIII. The Board erred in admitting into evidence over the objection of petitioner, each and all of the following portions of the stipulation of facts between petitioner and respondent—such

245 facts being immaterial and irrelevant to the issues of the case—to the admission of each of which separately proper objection was made at the time and exception was duly taken and allowed:

The first sentence of paragraph 23, the whole of paragraph 24; the closing sentence of paragraph 25; the last sentence of paragraph 31; that portion of paragraph 32 beginning with the item "On December 1929 check in the amount of $33,000" to the end of said paragraph, and the documents referred to therein and marked Respondent's Exhibits Q, R, S, T, and U; the first sentence of paragraph 37 and the documents referred to therein and marked Respondent's Exhibits V and W; paragraph 38 and the document referred to therein and marked Respondent's Exhibit X; paragraph 39 and the documents referred to therein and marked Respondent's Exhibits Z, AA, BB, and CC; paragraph 41 and the documents referred to therein and marked Respondent's Exhibits DD and EE; paragraph 42; the first sentence of paragraph 59 and the minutes of the meeting of the Board of Directors which were referred to therein and marked Respondent's Exhibit SS; the second paragraph of paragraph 59 and the document referred to therein and marked in evidence as Respondent's Exhibit TT; paragraph 60 and the document referred to therein and marked Respondent's Exhibit UU; paragraphs 61, 62, 63, 64, 65, 66, 67, and 68 and the documents referred to there-

in and marked Respondents Exhibits VV, WW, XX, YY, ZZ, AA, BB, CC, DD, EE, and FF.

246 XLIV. The Board erred in denying petitioner's motion made at the close of respondent's case that no sufficient proof had been submitted by respondent to warrant a finding that petitioner filed a false or fraudulent income tax return for either 1929, or 1930, with intent to evade a tax, to which ruling an exception was duly taken at the time and allowed.

XLV. The Board erred severally in admitting or in excluding evidence in each and all of the following respects—to each of which rulings an exception was duly taken at the time and allowed:

1. In refusing to permit the witness Harry W. Forbes to testify, pursuant to an offer of proof made by petitioner's counsel, regarding a conference between Garrard Winston and the witness, which offer of proof was as follows:

"The petitioner offers to prove in this connection that Mr. Garrard Winston, his (Forbes) partner, came to him and asked him about this receipt, if he had drawn it, spoke of the action of the Directors meeting, and said that the next problem that would confront them would be how the Company should treat this payment in view of the adjustment that had been made by the receipt from a taxing standpoint and asked the witness if he had looked up the matter and requested that he investigate it and come to him with the results, and it was upon an investigation subsequent to that investi-

247 gation that Mr. Winston and this witness formed their opinion as to what the Company should do as to the reporting of that item of $666,000 to the State authorities and the Federal taxing authorities."

2. In refusing to permit the witness Harry W. Forbes to testify in answer to the following question duly asked by petitioner's counsel:

"If you had been told at the time of your December 20th conference with Mr. Mitchell and your advice to him that Mrs. Mitchell at that time was worth the sum of $940,000, would that information have varied in any way the advice that you gave him?"

3. In refusing to permit the witness Harry W. Forbes to testify in response to the following question:

"In your opinion was any notice to Morgan & Co. as to the making of this sale to Mrs. Mitchell essential to the validity of the sale or to the transfer of title of the shares to her?"

This question was supported by an offer of proof made by petitioner's counsel in this connection as follows:

"I expect to prove that in the opinion of this witness a notice to Morgan & Company was not in any manner essential to a valid sale and transfer of title to Mrs. Mitchell."

4. In permitting the witness Garrard Winston (on cross ex-

248 amination) to testify over the objection of petitioner, as to events which occurred after March 15, 1930.

5. In permitting the witness Garrard Winston to testify over the objection of petitioner in answer to the following question:

"Can you tell me a single instance in the entire period of your connection with the City Company, in which a reserve of an entire amount of a debt, in which a reserve of $1 was set up against it, without any inquiry whatever by the Board as to whether it was collectible?"

6. In overruling the objection of petitioner to the question put by respondent's counsel:

"At any time at any meeting of the Board of Directors of the National City Company in December of 1929 or in 1930 did any director suggest or did the petitioner suggest that moneys arising out of the Management Fund of the National City Bank should be applied against this indebtedness arising out of the July 1929, payments?"

and in permitting the witness to answer the same.

7. In overruling the objection of petitioner to the question asked of the witness Garrard Winston:

"Do you know whether there was any discussion at any time by the Board of Directors of the National City Company authorizing the elimination of the payment of July 1929, from consideration of debts?"

249 and in permitting the witness to answer the same.

Wherefore, your petitioner prays that this Honorable Court may review the said findings, decision, opinion, and final decision redetermining the tax and reverse and set aside the same except such part thereof as determines that there is no deficiency in tax for the year 1930, and that this Honorable Court shall find and decide as follows:

1. That petitioner did not file a false and fraudulent income tax return for the years 1929 or 1930 with intent to evade tax and that no deficiency in tax existed for the year 1929 which was due to fraud with intent to evade tax.

2. That no deficiency in income of $728,709.84 or any sum existed for the year 1929, and that petitioner is not subject to said tax or a penalty thereon of $364,354.92 or of any sum in connection with petitioner's income tax for the year 1929.

3. That the sale of 18,300 shares of National City Bank stock by petitioner to Mrs. Mitchell on December 20, 1929, was genuine and bona fide and petitioner did not commit fraud with intent to evade tax in deducting from his net income for the year 1929 for income tax purposes the sum of $2,872,305.50 as a loss realized by petitioner upon such sale.

4. That in failing to include in his gross income for 1929 for
250 income tax purposes the July 1, 1929, Management Fund distribution of $666,666.67 petitioner did not act in a false and fraudulent manner with intent to evade tax.

5. That respondent was barred from determining, and is barred from assessing, under Section 275 of the Revenue Act of 1928, any

additional income tax against petitioner for the calendar year 1929, more than two years having elapsed since filing of petitioner's income tax return for said year.

6. That the verdict of the jury in a criminal action for evasion of income tax entitled United States of America v. Charles E. Mitchell, tried in the United States District Court for the Southern District of New York, adjudicated and determined in favor of petitioner, all of the material issues of fact involved in the proceeding before the Board and thereby constituted a previous adjudication of facts in favor of petitioner and estopped and barred the Board from holding that the petitioner filed a false and fraudulent income tax return for the years 1929 and 1930 with intent to evade tax.

7. That the assessment and collection of all or any of said additional taxes and penalty for the year 1929 would violate petitioner's constitutional rights and subject him to double jeopardy.

And that the Clerk of the said United States Board of Tax Appeals be directed to transmit and deliver to the Clerk of this Court certified copies of each and every document necessary and
251 material to the presentation and determination of the foregoing petition for review and as required by the rules of said Court and statutes made and provided, and that your petitioner may have such other and further relief as to this Honorable Court shall seem proper.

And your petitioner will ever pray.

CHARLES E. MITCHELL,
Petitioner.

(Signed) William Wallace,
WILLIAM WALLACE,
Attorney for Petitioner,
No. 25 Broadway, New York, N. Y.

[*Duly sworn to by Charles E. Mitchell; jurat omitted in printing.*]

252 In United States Circuit Court of Appeals, for the Second Circuit

B. T. A. Docket No. 74720

CHARLES E. MITCHELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of the evidence

Filed July 31, 1936

The above entitled cause came on for hearing on the 30th day of April 1934, before Honorables Jed C. Adams, W. C. Lansdon, and Ernest H. Van Fossan, members of the United States Board of Tax

Appeals at Washington, D. C., pursuant to notice of hearing theretofore given, and was continued on May 1st, 2nd, 3rd, and 4th, 1934.

Petitioner appeared by William Wallace, Esq., Leonard P. Moore, Esq., and Robert L. Reed, Esq. Respondent appeared by Edward S. Greenbaum, Esq., Thomas E. Dewey, Esq., James D. Head, Esq., and Nathan Gammon, Esq. (Robert H. Jackson, Esq., Assistant General Counsel, Bureau of Internal Revenue).

Thereupon the following proceedings were had and testimony heard by said members. All of the evidence introduced by both parties material and necessary to the determination of the questions presented by the assignments of error set out by petitioner in his Petition for the Review by this Court of the decision of the
253 Board of Tax Appeals is herein set out. All of the exhibits referred to in the testimony of proceedings, material and necessary to the determination of the assignments of error above mentioned, are incorporated by reference as a part of this statement of evidence.

The respondent assumed the burden in the first instance of going forward with his proof and, to maintain material averments on his behalf, introduced the following proof.

Offers in evidence

Evidence for Respondent

A Stipulation of Fact, dated April 25, 1934, had been agreed upon between counsel for petitioner and counsel for respondent. The first two paragraphs of said Stipulation read as follows:

"It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys of record that, for the purpose of this proceeding only, the following facts shall be taken as true, and that the exhibits referred to herein and submitted herewith are hereby made a part of this stipulation as fully and with the same force and effect as if each exhibit were specifically incorporated in this stipulation, provided, however, that the right is reserved to either party to object to the relevancy or materiality of any facts stated herein or any exhibit submitted herewith, which objections may be interposed and urged upon the hearing; and

"It is further stipulated and agreed that this stipulation
254 shall be without prejudice to the right of either party to introduce further testimony at the trial of the cause, subject to all proper objections to the admissibility in evidence of testimony so offered."

Respondent's direct case consisted chiefly of offering and reading into the evidence certain portions of said Stipulation of Fact and exhibits referred to therein as follows (the paragraph numbers of the Stipulation of Fact received in evidence being prefixed to the paragraphs hereinafter set forth. Said portions of said Stipulation

and said exhibits were offered and received in evidence without objection unless the contrary is expressly indicated):

1. On March 15, 1930, petitioner filed his federal income tax return for the calender year 1929 (Exhibit A).

(Exhibit A was received in evidence.)

2. On March 14, 1931, petitioner filed his federal income tax return for the calendar year 1930 (Exhibit B).

(Exhibit B was received in evidence.)

5. On the morning of October 29, 1929, petitioner arranged with J. P. Morgan & Company for a loan up to $12,000,000 to be secured by National City Bank stock as collateral, at not more than $200 per share. On October 30, 1929, petitioner confirmed by letter his understanding as to the $12,000,000 J. P. Morgan & Company credit (Exhibit C).

(Exhibit C was received in evidence.)

6. On October 30, 1929, petitioner delivered to J. P. Mor-
255 gan & Company as part of the collateral to secure the proposed loan, 30,000 shares of National City Bank stock personally owned outright by him, standing in his name and endorsed in blank.

7. The stock last above referred to had all cost petitioner less than $200 per share.

9. On October 29, 1929, a special account was opened on the books of The National City Company for shares of National City Bank stock purchased for petitioner's account, and on that day an aggregate of 28,306 shares of National City Bank stock was purchased and placed in that account. The average cost of 28,300 shares of this stock, hereinafter referred to, was $367.0028 per share, totaling $10,386,179.50.

10. Said 28,300 shares were registered in the name of Taff & Company, a nominee of The National City Company, used for the purpose, among other things, of acting as a nominee or registered owner of securities, in the place of the owners thereof. As such nominee, Taff & Company received and disbursed dividends for the accounts of the true owners.

11. Pursuant to petitioner's instructions, said 28,300 shares of National City Bank stock were delivered to J. P. Morgan & Company. On October 30, 1929, 10,000 shares were delivered to J. P. Morgan & Co., who paid to The National City Company $3,634,274, the cost of said 10,000 shares. On October 31, 1929, the remaining 18,300 shares of National City Bank stock were delivered to J. P. Morgan &
256 Company, who paid to The National City Company $6,751,-905.50, the cost of said 18,300 shares. The total of 28,300 shares of stock so delivered to J. P. Morgan & Company was placed in the petitioner's account, which was charged with $10,386,179.50, the amount paid out against such stock.

12. Puhsuant to petitioner's instructions, J. P. Morgan & Company delivered to The National City Company from the 28,300 shares above referred to, in petitioner's loan account, 4,000 shares of National City Bank stock at $435 per share and 1,000 shares at $425

per share, both on November 4, 1929, and 5,000 shares at $425 per share on November 6, 1929, and received checks of The National City Company aggregating $4,290,000 in payment thereof, which sum was credited by J. P. Morgan & Company against petitioner's loan account. The National City Company had sold the said 10,000 shares for petitioner's account at the prices above mentioned on or before November 4, 1929, and had received payment therefor.

13. As a result of the aforesaid credit, there was a balance due from petitioner to J. P. Morgan & Company on November 7, 1929, of $6,096,179.50 as collateral for which J. P. Morgan & Company held the aforesaid 30,000 shares of National City Bank stock registered in the name of petitioner and the remaining 18,300 shares of said National City Bank stock registered in the name of Taff & Company. J. P. Morgan & Company continued to hold all of said stock as collateral for petitioner's loan at all times hereinafter referred to.

257 14. Petitioner realized a profit of $655,726 from the sale of the said 10,000 shares of the 28,300 shares of National City Bank stock. This profit was reported on petitioner's 1929 federal income tax return.

16. Prior to December 20, 1929, petitioner had realized profits from the sales of securities during the year 1929 of $1,388,237.97, which amount included the profit of $655,726 realized on the sale of the total of 10,000 shares of the 28,300 shares of National City Bank stock described in paragraph 14. In addition to these profits from the sales of securities, petitioner received during the year 1929 from the National City Bank and The National City Company salaries and payments from management funds, in the sum of $1,206,195.02, exclusive of the sum of $666,666.67 hereafter referred to, received on or about July 1, 1929, from the management fund of The National City Company.

17. On December 20, 1929, petitioner's wife, Elizabeth R. Mitchell, had total assets consisting of the following, and having a then market value as follows:

Bonds	$260,336.19	Mortgage participations	50,000.00
Stocks	577,630.13		
Garage	21,000.00	Total	940,994.12
Cash in banks	32,027.80		

exclusive of jewelry, furniture, objects of art, books and the cash value of life insurance policies on the life of the petitioner.

258 The cost of the garage and the par value of the mortgage participations are as stated above. The market value is unknown.

18. From 1918 up to and including February 20, 1930, Mrs. Mitchell's investments were handled by Mr. E. F. Barrett under the direction of petitioner. During that period Mrs. Mitchell's securities were in the custody of the Customer's Securities Department of The National City Company.

19. In 1918 Mr. Barrett entered petitioner's employ as his private secretary. From that position he became, successively, Assistant

Secretary of The National City Company, President of The National City Realty Corporation, Assistant Cashier of The National City Bank, Assistant Vice-President of The National City Bank, and, finally, in 1926, a Vice-President of The National City Bank.

20. Mr. Barrett kept detailed records of Mrs. Mitchell's investment account from 1918 up to February 1930. Mrs. Kline, Mr. Barrett's secretary, assisted Mr. Barrett in keeping records of Mrs. Mitchell's accounts. All entries in these accounts were made either by Mr. Barrett or by his secretary, Mrs. Kline. Mrs. Mitchell's Cash Books and Ledger are Exhibits D, E and F for identification, respectively.

22. On the evening of December 20, 1929, the petitioner signed a letter addressed to Mrs. Mitchell (Exhibit G) and she signed a letter to petitioner (Exhibit H). Exhibit G and a copy
259 of Exhibit H were thereafter delivered by petitioner to E. F. Barrett. Petitioner also executed and delivered to Taff & Company a letter dated December 20, 1929 (Exhibit I).

(Exhibits G, H, and I were received in evidence.)

23. At that time no internal revenue or state transfer tax stamps were attached to any of the letters described in the preceding paragraph, and there was no bill of sale executed in connection with said transaction of December 20, 1929. Subsequently, on or about the 11th day of August, 1933, on demand by the Collector of Internal Revenue, petitioner purchased internal revenue stamps in the amount of $116.46, which were affixed on the 11th day of August 1933 to Exhibit G.

Counsel for petitioner objected to the first sentence of said paragraph as immaterial to any issue, and on the ground that neither transfer stamps nor a bill of sale was essential to a valid transfer of title to the shares referred to. Objection overruled; exception taken.

24. J. P. Morgan & Company was not notified or advised of the transaction of December 20, 1929, and copies of the letters (Exhibits G and H) were not shown to J. P. Morgan & Company, or any representative of that firm. In or about the month of January 1931, J. P. Morgan & Company received for the first time knowledge or information to the effect that petitioner had or claimed to have sold said 18,300 shares of National City Bank stock.

260 Counsel for petitioner objected to this paragraph on the ground that a notice to Morgan & Company was not essential to a transfer of title to the shares and that such notice would not affect any right of Mrs. Mitchell. Objection overruled; exception taken.

25. Mrs. Mitchell's ledger (Exhibit F, id.) contains an entry on page 116 entitled "National City Bank Stock," reading as follows: "1929—Dec. 20—Bought at 212—18,300 shares—cost $879,600." This figure was computed by Mrs. Kline from the copies of letters (Exhibits G and H) delivered to her by Barrett for filing. In Mrs.

Kline's handwriting appear, in pencil, the words "See file on securities." No other entries of any kind appear in Mrs. Mitchell's books concerning this transaction.

Counsel for petitioner objected to the last sentence of said paragraph on the ground that no entries were essential to accomplish a transfer of title to the shares. Objection overruled; exception taken.

28. On or about February 18, 1930, Mrs. Mitchell's custodian account at The National City Company was transferred to the City Bank Farmers Trust Company, which assumed the management of this account. The City Bank Farmers Trust Company gave to Mr. Barrett a receipt dated February 18, 1930, for the securities transferred.

29. On or about February 18, 1930, petitioner in his office handed to Lindsay Bradford, Vice-President of City Bank Farmers Trust
261 Company, the original letter from petitioner to Mrs. Mitchell (Exhibit G), a copy of the letter from Mrs. Mitchell to petitioner (Exhibit H), and a copy of the letter from petitioner to Taff & Company (Exhibit I). Mr. Bradford gave these papers to H. D. Sammis, Vice-President of the City Bank Farmers Trust Company, who placed them in a sealed envelope marked "Confidential a/c E. Rend Mitchell—Letters and papers re securities with J. P. Morgan & Co., envelope only to be opened on instructions from Mrs. Mitchell or E. F. Barrett, vice-president, National City Bank, or Lindsay Bradford, vice-president, City Bank Farmers, or H. D. Sammis, vice-president, City Bank Farmers." On February 18, 1930, the Trust Company gave Barrett a receipt covering this envelope (Exhibit J.). This envelope was then placed in the value of the trust company, in which records of customers were kept.

(Exhibit J was received in evidence.)

30. Mrs. Mitchell's account with the City Bank Farmers Trust Company was credited with dividends on 18,300 shares of National City Bank stock as follows:

April 1, 1930	$18,300	April 1, 1931	$18,300
July 1, 1930	18,300	July 1, 1931	18,300
October 1, 1930	18,300	October 1, 1931	18,300
January 2, 1931	18,300	January 2, 1932	18,300

The dividend rate on said National City Bank stock was $4
262 per share per annum, payable quarterly, and this was the dividend rate payable on said stock since April 1929. The fact of said dividend rate was published.

31. During the period from December 20, 1929, to March 24, 1932, there was paid to petitioner from Mrs. Mitchell's account sums in the amounts and on the dates as follows:

April 1, 1930	$59,810.50	April 1, 1931	$48,495.00
July 1, 1930	49,033.84	July 1, 1931	49,033.84
October 1, 1930	49,572.67	October 2, 1931	49,576.67
January 2, 1931	49,572.67	January 2, 1932	49,572.50

Mrs. Mitchell made no payments to petitioner between December 20, 1929, and March 24, 1932, other than those above set forth.

Counsel for petitioner objected to the last sentence of said paragraph on the ground that it was immaterial to any issue in the case and had no effect upon the question of title to the shares. Objection overruled; exception taken.

Counsel for respondent offered and there was received in evidence paragraph 32 without offering exhibits 45 to 50, inclusive, which were later offered by petitioner and received in evidence:

32. On December 25, 1919, petitioner delivered to Mrs. Mitchell a deed covering premises 933 Fifth Avenue, New York City, as a Christmas gift. The property was subject to a first mortgage in the amount of $110,000. On August 2, 1926, Mrs. Mitchell sold the premises 933 Fifth Avenue to Mr. Gordon F. Rentschler, the
263 purchase price of $300,000 being payable $190,000 in cash and the assumption by the purchaser of the outstanding mortgage of $110,000. Under date of August 2, 1926, and June 1, 1928, petitioner wrote to Mrs. Mitchell concerning this transaction (Exhibits 45 and 46). Letters were also written by petitioner to Mrs. Mitchell on September 14, 1926, February 8, 1927, and July 20, 1927, with regard to the payments of $50,000, $25,000 and $15,000 on said dates, respectively, which payments, together with the $100,000 referred to Exhibit 46, paid the $190,000 loan. Petitioner's ledger has an entry under August 2, 1926, relating to this matter (Exhibit 47). On December 31, 1926, a statement was prepared showing interest due to Mrs. Mitchell from petitioner on loan (Exhibit 48). Frank W. Black, hereinafter referred to, prepared a work sheet showing computation of interest due from petitioner to Mrs. Mitchell for 1937 (Exhibit 49) and a work sheet showing interest due to her for 1928 (Exhibit 50).

The $190,000 loan by Mrs. Mitchell to petitioner and the sum of $110,000, the amount of the mortgage, were paid by petitioner to Mrs. Mitchell, with interest, over a period of years, and entries in reference to certain of said payments appear in Mrs. Mitchell's books of account (Exhibits E id., F id.), as hereinafter summarized. During the period from December, 1919, to December 31, 1932, petitioner made payments and/or gifts to Mrs. Mitchell as follows:

Date	Item	Designation	Amount	Where deposited
1919 Dec. 31	$5,000 Inter. Rapid Transit Rwy. 5's, '66 Bonds.	"Gift from Mr. C. E. M." (Exh. F, id., p. 55).	[1] $2,850	
264 1922 Sept. 8	Check	"From C. E. M. (Gift)" (Exh. D, id., p. 98).	5,000	Business account.
1925 July 29	Check	"CK. from Mr. C. E. M. in reimbursement Ins. premiums" (Exh. E, id., p. 16).	14,346	" "
1926 July 21	Check	"Loan from Mr. C. E. M." (Exh. E, id., p. 40).	7,000	" "
Sept. 14	Check	"Reduction of loan to Mr. C. E. Mitchell" (Exh. E, id., p. 44).	50,000	" "
1927 Feb. 8	Check	"Reduction of loan to Mr. Mitchell" (Exh. E, id., p. 54).	25,000	" "

[1] Market value.

Date	Item	Designation	Amount	Where deposited
1927				
Feb. 16	Check	"Interest on loan" (Exh. E, id., p. 54)	$5,541.67	Business account.
July 21	Check	"Reduction Mr. Mitchell's $190,000 loan" (Exh. E, id., p. 64).	15,000	" "
1928				
Mar. 20	Check	"Loan from Mr. C. E. Mitchell" (treated as payment on account of principal of $110,000) (Exh. E, id., p. 80).	5,000	" "
June 1	500 shs. Hershey Choc. pfd. Stock. 800 shs. U. S. Realty & Imp. common stock. 200 shs. Johns Manville Corp. common stock. 200 shs. General Motors common stock.	Payment on account of principal (see Exh. F, id., pp. 95, 110, 111 and Exh. 46).	[1] 147,000	
July 26	Check	"Loan from Mr. C. E. Michell" (Exh. E, id., p. 88).	5,000	" "
1929				
Mar. 16	Check	"Check from Mr. C. E. Mitchell" (interest) (Exh. E, id., p. 104).	5,000	" "
Mar. 20	Check	"Check from Mr. C. E. Mitchell" (interest) (Exh. E, id., p. 104).	15,000	" "
Apr. 29	Check	"Check from Mr. C. E. Mitchell—Int. on loan" (Exh. E, id., p. 106).	1,686.11	" "
265				
May 2	Check	"Check from Mr. C. E. M. Reimbursement for charities from Jan. 1, 1929" (Treated as payment on principal) (Exh. E, id., p. 108).	15,000	"
June 17	Check	"Gift from Mr. Mitchell" (Treated as payment on principal) (Exh. E, id., p. 110).	5,000	"
Aug. 5	Check	(Payment on account of principal)	5,000	Personal account.

[1] Market value.

Counsel for petitioner objected to the following items of paragraph 32 and the following exhibits on the ground that said items and exhibits had no bearing upon the issue of good faith. Objection overruled; exception taken.

Date	Item	Designation	Amount	Where deposited
Dec. 19	Check	"C. E. M. check" (Treated as payment on account of principal) (Exh. E, id., p. 122).	$33,000	Business account.
Dec. 28	Check	"Deposit made by Mrs. Mitchell" (Exh. E, id., p. 122).	5,000	Business account.
1930				
June 4	$10,000 Rossville Commercial Alcohol 6% Deb. Bonds. $10,000 Lautoro Nitrate 6% Conv. Bonds. $25,000 So. Pac. 40 yr. 4½% Bonds. $5,000 Sugar Estates of Oriente 7% 1942 Bonds.	Wedding Anniversary gift (Letter from petitioner to City Bank Farmers Trust Co., dated June 4, 1930, Exh. K).	[1] 42,500	
July 1	Check	"Proceeds of loan at 4%" (Exh. T)	25,000	Principal account.
Aug. 21	500 shs. U. S. Realty & Impr. stock.	Birthday gift (letter from petitioner to City Bank Farmers Trust Co. Aug. 21, 1930, Exh. L).	[1] 22,500	Principal account
1931				
Jan. 21	Check	Christmas gift (Letter of Petitioner to Lindsay Bradford Jan. 21, 1931, Exh. M).	25,000	Principal account.
266				
Apr. 10	Check	Gift (Letter, petitioner to City Bank Farmers Trust Co., April 10, 1931) (Exhibit N).	30,000	Principal account.
June 30	Check	Gift (Letter, petitioner to City Bank Farmers Trust Co., June 30, 1931, Exhibit O).	25,000	Principal account.

[1] Market value.

Date	Item	Designation	Amount	Where deposited
1931				
Aug. 18	Check	Birthday Gift (Letter from petitioner to Lindsay Bradford, Aug. 18, 1931, Exhibit P).	$10,000	Principal account.
Aug. 18	Check	Gift (Exhibit T)	5,000	Personal account.
Oct. 6	Check	Gift, on occasion of petitioner's birthday (Letter of petitioner to Lindsay Bradford, Oct. 6, 1931, Exhibit Q).	25,000	Principal account.
Dec. 24	Check	Gift	1,000	Personal account.
Dec. 25	Check	Christmas gift (Letter, petitioner to City Bank Farmers Trust Co., Dec. 29, 1931, Exhibit R).	30,000	Principal account.
1932				
Aug. 11	Check	Gift (Letter, petitioner to Lindsay Bradford Aug. 11, 1932, Exhibit S).	5,000	Principal account.
Aug. 11	Check	Gift	5,000	Personal account.
Dec. 24	Check	Gift	1,000	Personal account.

In the years 1925 and 1926 the petitioner transferred to Mrs. Mitchell certain policies of insurance on his life and thereafter Mrs. Mitchell paid the premiums thereon as indicated in Exhibits D, id., E, id., F, id., T, U.

(Exhibits K, L, M, N, O, P, Q, R, S, T, and U received in evidence.)

Counsel for petitioner objected to the last sentence on the
267 further ground that the sentence had no bearing upon the transfer of title to the shares or upon the intention of the parties. Objection overruled; exception taken.

Counsel for petitioner objected further to that portion of Exhibits T and U which contained entries pertaining to the dividends on 18,300 shares of National City Bank stock and the comparison made between them as having no bearing upon the issues concerning the sale of such shares, and on the ground that there was no proof connecting the petitioner with any of such entries. Objection overruled, exception taken.

34. From 1920 to April 24, 1928, Mrs. Mitchell had accumulated 375 shares of National City Bank stock at a total cost of $101,495.00. By January 17, 1929, Mrs. Mitchell had sold 275 shares of National City Bank stock and 200 rights for a total of $293,209.02, leaving her with a balance of 100 shares, which, by reason of a 5 to 1 split-up, became 500 shares of National City Bank stock after January 1929.

35. Exhibits T and U are transcripts of Mrs. Mitchell's principal and income accounts in the City Bank Farmers Trust Company, and set forth all the records concerning Mrs. Mitchell's account which appear in the books of the City Bank Farmers Trust Company for the period from February 18, 1930, until April 1, 1932.

36. Petitioner paid to J. P. Morgan & Company interest on his loan on the following dates and in the following amounts:

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December 31, 1929	$66,506.04	March 31, 1931	$73,335.62
March 29, 1930	83,822.47	June 30, 1931	74,150.46
June 30, 1930	77,048.94	September 30, 1931	74,965.30
October 1, 1930	77,895.63	December 31, 1931	74,722.41
December 1, 1930	77,736.36		

37. On or about October 2, 1931, Herbert Peterson, Assistant Trust Officer of the City Bank Farmers Trust Company, delivered to Mr. George Sweeney, petitioner's secretary, a memorandum (Exhibit V) and on or about August 11, 1932, he delivered to Mr. Sweeney a memorandum (Exhibit W).

Counsel for petitioner objected to the portion of paragraph 37 offered in evidence and Exhibits V and W therein referred to upon the ground that no act of Peterson or Sweeney in October 1931 or August 1932 could have any effect or probative force as to petitioner's intention as to the December 20, 1929, transaction.

(Exhibits V and W marked for identification.)

The attorneys for petitioner and respondent agreed upon a statement of testimony which Mr. George Sweeney would give if he were called to testify as a witness. At this point a portion of such testimony was read into evidence, as follows:

GEORGE SWEENEY:

Q. Mr. Sweeney, for a while you were Mr. Mitchell's secretary, weren't you? A. For four years.

269 Q. When did you become his secretary? A. October 19, 1929.

Q. And how long did you serve as his secretary? A. For four years.

Q. During all of the time after that that he continued to be connected with the bank? A. That is correct.

Q. You were his secretary during all of 1930 and 1931 and 1932? A. That's right.

Q. Did you know during that time that Mrs. Mitchell had an account at the City Bank Farmers Trust Company? A. In 1930, but not in 1929.

Q. That was an investment management account? A. I don't know what account it was really.

Q. Did you know in 1930, who had charge of her affairs at the City Bank Farmers Trust Company? A. Oh, yes.

Q. And who was it? A. The only one I had direct contact with at that time was Mr. Peterson of the City Bank Farmers Trust Company.

Q. What is his business, his office? A. He is assistant trust officer.

Q. Did you occasionally call Mr. Peterson for information with respect to that account? A. Yes, I did.

Q. Now, on or about October 2nd, 1931, did you see Mr. Peterson? A. I don't recall ever seeing him. I called him on the phone several times.

Q. You know his voice, don't you? A. Oh, yes.

Q. Did you receive any paper from him? A. I received a memorandum from him.

Q. Is this the memorandum (Exhibit V for Identification) that you received? A. Yes, I believe it is.

270 Q. You haven't any doubt about it? A. None at all.

Q. Did you ever talk with Mr. Mitchell about this? A. Nothing more than Mr. Mitchell's request. He requested me to get this memorandum.

Q. And did you deliver his request to Mr. Peterson? A. That is right.

Q. You say you delivered this memorandum to Mr. Mitchell? A. That's right.

Q. After you delivered it to Mr. Mitchell, did he say anything to you about it? A. No, I would simply leave it on his desk.

Q. Did he ever return the memorandum to you? A. I cannot recall that.

Q. Ever see various items on this memorandum of October 2nd, 1931—you recall that, don't you? A. I do.

Q. It is entitled, "Re: Account E. Rend Mitchell." A. Yes.

Q. And contains items marked 1931 of receipts and items marked disbursements? A. Yes.

Q. And also an item difference due Mrs. Mitchell? A. Yes, sir.

Q. You recall that, don't you? A. I cannot recall the difference due Mrs. Mitchell. I have told Mr. Dewey and Mr. Gurfein about that.

Q. Will you look at this memorandum (handing paper, Exhibit V for Identification, to witness)? A. Yes, sir.

Q. What was the practice in your office with respect to papers given to Mr. Mitchell, if he didn't prepare any of them, where would he ordinarily place them? A. In his own desk.

Q. Would they be put in the file if he returned them to you? A. If he initialled the memorandum, it would be placed in the file.

271 Q. Did he ever return it to you? A. I cannot recall.

Q. Did you find it in the file? A. I don't know that I did.

Q. You didn't, did you? A. I don't remember.

Q. You looked through the files for that memorandum, didn't you? A. No; I did not.

Q. Did you have someone look? A. No; I was told it was not there.

Q. Then, you asked, didn't you? A. No; they asked me if I had seen the original.

Q. Who asked you? A. Your assistants.

Q. Didn't you look in the files for that? A. No; I didn't, no.

Q. I show you a memorandum of August 11, 1932 (Exhibit W for Identification), and I ask you if you recall that memorandum? A. I do; yes.

Q. Were you told to get that memorandum? A. Oh, yes.

Q. Who told you? A. Mr. Mitchell.

Q. And did you ask Mr. Peterson for it? A. Yes.

Q. Did Mr. Mitchell instruct you as to the items he wanted on that memorandum? A. Oh, yes.

Q. When you received it, did you give the original to Mr. Mitchell? A. Yes; I believe I did.

Q. Did you ever have a conversation with him about that memorandum? A. No.

Q. Did Mr. Mitchell say anything to you about either of these memoranda after you either gave it to him or put it on his desk? A. No.

Counsel for respondent offered in evidence Exhibits V and
272 W for identification. Counsel for petitioner renewed the same objection; objection overruled; exception taken.

(Exhibits V and W received in evidence.)

38. Petitioner's attorneys, Messrs. Cravath, de Gersdorff, Swain & Wood, wrote a letter dated March 5, 1932 (Exhibit X). Petitioner, by letter dated March 11, 1932, forwarded Exhibit X to Hugh Baker, President of National City Company. Baker caused Exhibit X to be presented to the Board of Directors of that company, at a meeting. Petitioner attended this meeting but withdrew therefrom prior to the presentation to the Board of Exhibit X, and was not present when the matter was under consideration. The matters referred to in Exhibit X were the subject of conferences among the directors of National City Company and National City Bank, before and after the submission of said letter by petitioner as aforesaid, and petitioner attended certain conferences concerning his claim referred to in said letter. An informal committee of directors of the National City Company and of the National City Bank considered the matter referred to in said letter and took the opinion of Hon. John W. Davis in regard thereto. Thereafter and on June 29, 1932, petitioner wrote to Hugh Baker, President of the National City Company (Exhibit Y).

Counsel for petitioner objected to said paragraph on the ground that no one or all of the facts therein stated warranted any inference that the transaction of December 20, 1929, was not a sale or was not intended by petitioner to be a sale; objection overruled; exception taken.

Counsel for petitioner objected to the receipt in evidence of
273 Exhibit X on the ground that there is no relation between it and Mrs. Mitchell who was the purchaser of the stock, that she bought some property, that it was acquired in the functioning of credit that had been extended by Mr. Mitchell to the National City Company, and all his relations and claim to that company grew out of the fact that he had extended and used his own credit to that company and because they did not make him whole he had to get out of it the best he could, but the shares did not have any of that claim; they could not have. Objection overruled; exception taken.

(Exhibit X received in evidence.)

Counsel for petitioner objected to the receipt in evidence of Exhibit Y on the ground that it had no relation to the issue of the sale of 18,300 shares, the letter referring to an independent matter, namely: a claim belonging to Mr. Mitchell; objection overruled; exception taken.

(Exhibit Y received in evidence.)

39. On March 24, 1932, petitioner signed a letter addressed to Mrs. Mitchell (Exhibit Z). On the same date Mrs. Mitchell signed a letter addressed to petitioner (Exhibit AA). On the same date Mrs. Mitchell signed a letter addressed to Taff & Company (Exhibit BB). On the same date Mrs. Mitchell executed a bill of sale (Exhibit CC).

Counsel for petitioner objected to said paragraph and to each of the exhibits referred to therein on the ground that a repurchase made more than two years after the original transaction could have no tendency to warrant any inferences to the intention of the parties at the time of the original transaction; objection overruled; exception taken.

274 (Exhibits Z, AA, BB, and CC received in evidence.)

Counsel for respondent offered in evidence the following from a stipulation between petitioner and respondent:

"On March 24, 1932, the bid and ask price of National City stock was respectively, bid 44¼; asked 44¾.

"The price of National City stock on February 14, 1930, the bid was 255 and the asked was 257."

Counsel for petitioner interposed separate objections to each of these statements the same as the last objection; objection overruled, exception taken.

41. On March 25, 1932, petitioner signed and delivered a letter to Lindsay Bradford, Vice-President of the City Bank Farmers Trust Company (Exhibit DD). The enclosures referred to in said letter were the original of Exhibit Z and a copy of Exhibit AA. This letter was acknowledged by Lindsay Bradford by letter dated March 25, 1932 (Exhibit EE).

Counsel for petitioner objected to this paragraph and each of the exhibits referred to, on the same ground urged against paragraph 39; objection overruled; exception taken.

(Exhibits DD and EE were received in evidence.)

42. From time to time petitioner gave additional collateral to J. P. Morgan & Company to secure the loan established by him with J. P. Morgan & Company on or about October 29, 1929, as set
275 forth in Exhibit 52. From December 20, 1929, the net worth of petitioner declined, until in or about February 1931, petitioner advised J. P. Morgan & Company that he had exhausted all of his assets and was unable to furnish any further collateral. From February 1931, petitioner's financial condition became progressively worse and on March 24, 1932, petitioner was insolvent by an amount in excess of $3,000,000.

(Exhibit 52 not offered in evidence by counsel for respondent but subsequently introduced by counsel for petitioner.)

Counsel for petitioner objected upon the ground that the events set forth in paragraph 42 could have no relation to and could not characterize the intent in the minds of the parties on December 20, 1929; objection overruled; exception taken.

43. From 1911 to 1916 Frank W. Black was a partner of petitioner in the firm of C. E. Mitchell & Co. in New York City. From 1913 through 1930 petitioner's income tax returns were prepared by Black as a favor to petitioner. Black obtained the information for making out the returns either from petitioner or from the latter's secretary.

44. Black, with petitioner's knowledge and consent, made a calculation of petitioner's profits and losses on the sales of securities during the year 1929. With regard to petitioner's transaction with reference to the 18,300 shares of National City Bank stock, Black calculated the purchase price to be $6,751,905.50, subtracted
276 therefrom the sum of $3,879,600, being the equivalent of 18,300 shares at $212 per share. The difference of $2,872,305.50 was taken as a loss on petitioner's 1929 federal income tax return.

45. The federal income tax return (Exhibit A) thus prepared by Black was signed and verified by petitioner and forwarded to the office of the Collector of Internal Revenue for the Third Collection District of New York on or before March 15, 1930.

48. The management fund plan of The National City Company, providing additional compensation for certain of its officers was adopted at a meeting of the Board of Directors on February 8, 1921, as set forth in the minutes of said Board of Directors on said date (Exhibit FF). Certain changes in the provisions for said fund were made on January 25, 1927, as shown by the minutes of the meeting of the board held on said date (Exhibit GG).

(Exhibits FF and GG received in evidence.)

50. In 1899 the petitioner had a clerical position with the Western Electric Company and remained with that company until 1907, at which time he was Assistant Manager. He then became assistant to the President of the Trust Company of America and remained with said trust company until 1911, when he organized the firm of C. E. Mitchell & Company, dealers in investment securities. He continued with that firm until January 1916, when he became Vice-President of The National City Company. He became Presi-
277 dent of The National City Company in August 1916, and remained as President until April 1929, when he became its Chairman. During his presidency The National City Company in some years sold over a billion and a half dolalrs of securities. He became President of the National City Bank in 1921 and remained its President until April 1929, when he became its Chairman, and likewise became Chairman of the City Bank Farmers Trust Company in 1929, which was then absorbed by The National City Bank. He remained Chairman of The National City Company, National City Bank and City Bank Farmers Trust Company until March 1933.

51. At a meeting of the Board of Directors of The National City Company held on January 2, 1929, action was taken as set forth in the minutes of said meeting (Exhibit HH).

Thereafter, on January 3, 1929, The National City Company deposited $1,450,000 with the Bankers Trust Company of New York for the account of the management fund, which was maintained in

the name of S. W. Baldwin, Treasurer, and a distribution of said sum was made as payments from the management fund, petitioner receiving $483,333.33 in accordance with a memorandum dated January 3, 1929 (Exhibit II).

At meetings of the Executive Committee and the Board of Directors of The National City Company, both held on January 8, 1929, action was taken as set forth in the respective minutes of said meetings (Exhibit JJ and Exhibit KK). In accordance with a memorandum dated January 9, 1929, petitioner's percentage of
278 the management fund was fixed as 33⅓% (Exhibit LL).

(Exhibits HH, II, JJ, KK, and LL were received in evidence.)

52. At a meeting of the Board of Directors of The National City Company held on June 25, 1929, action was taken as set forth in the minutes of said meeting (Exhibit MM). Thereafter, on July 1st, The National City Company deposited $1,860,000, with Bankers Trust Company for the account of management fund, which was maintained in the name of S. W. Baldwin, Treasurer, and a distribution of said sum was made as payments from the management fund, petitioner receiving $666,666.67, in accordance with a memorandum dated June 27, 1929 (Exhibit NN).

(Exhibits MM and NN were received in evidence.)

53. In computing the amounts available for payments to the participants in the management fund, computations were made at the end of each month and credited to the account kept for that purpose entitled "Reserve for other Deductions" in those months in which there were accretions to said fund. In those months in which the company suffered losses, this account was correspondingly reduced. Credits were made to this account during every month of 1929 through the month of October. For the months of November and December there were no credits to this account, and the losses of The National City Company during the said months exceeded
279 the profits which it made during the first ten months of the year. Calculations of the management fund, during 1929, by H. F. Mayer, Vice-President and Comptroller of The National City Company, are shown in his work-sheets (Exhibit 57).

(The work-sheets marked 57 were not offered in evidence by respondent but subsequently by petitioner and became petitioner's Exhibit 57.)

54. During the first half of December 1929 a form of receipt was prepared. Petitioner signed a receipt in this form as set forth in Exhibit OO. Receipts in similar form were signed by all of the participants in the distribution of the management fund of July 1, 1929. Said receipts were placed in an envelope marked "Accounts Receivable, S. W. Baldwin, Treasurer, Special Account Management Fund 1929," which envelope thereafter remained in the vaults of The National City Company. Other records of the company were kept in the same vault.

(Exhibit OO was received in evidence.)

55. At a meeting of the Board of Directors of The National City Company held on December 30, 1929, action was taken as set forth in the minutes of said meeting (Exhibit PP).

(Exhibit PP was received in evidence.)

56. As of December 30, 1929, there was set up on the accounts receivable and payable ledger of The National City Company a debit to "Accounts Receivable and Payable" and a credit to "Reserve for other Deductions" in the amount of $1,860,000. This entry was carried forward to the year 1930.

280 57. At a meeting of the Board of Directors of The National City Company held on January 9, 1930, action was taken as set forth in the minutes of said meeting (Exhibit QQ).

Thereafter, on or about January 18, 1930, petitioner sent a letter to each of the participants in the management fund distribution of July 1, 1929, a copy of which is set forth in Exhibit RR.

(Exhibits QQ and RR were received in evidence.)

59. At a meeting of the Board of Directors of The National City Company held on December 30, 1930, action was taken as set forth in the minutes of said meeting (Exhibit SS).

On or before January 2, 1931, payments were made as shown in Exhibit TT, aggregating $140,938.98 out of the account known as "Reserve for other Deductions," this sum being the balance left in this account in January 1929, after all distributions had been made. The petitioner received on this distribution the sum of $50,515.53.

Counsel for petitioner objected on the ground that neither the resolution for distribution nor the actual distribution of $140,000 referred to had any bearing upon petitioner's intention respecting the reporting of the $666,666.67 item because $140,000 was not an accumulation of the fund in any future year but was the undistributed balance for 1928; objection overruled; exception taken.

(Exhibits SS and TT received in evidence.)

60. At a meeting of the Board of Directors of The National
281 City Company held on January 6, 1931, action was taken as set forth in the minutes of said meeting (Exhibit UU).

Counsel for petitioner interposed the same objection as that interposed to paragraph 59 and the exhibits referred to therein to paragraph 60 and Exhibit UU; objection overruled; exception taken.

(Exhibit UU received in evidence.)

At this point, to save objections to each paragraph and the exhibits referred to therein, counsel for petitioner took a like objection to each paragraph from 59 through 67, inclusive, of the stipulation of facts and to each exhibit therein referred to, said objections to be deemed overruled and exceptions taken and the presiding member of the board authorized the record to show such procedure would be allowed and followed.

61. At a meeting of the Board of Directors of The National City Company held on January 9, 1931, action was taken as set forth in the minutes of said meeting (Exhibit VV). A copy of the balance

sheet and analysis of surplus and reserves referred to in said minutes is set forth in Exhibit WW.

(Exhibits VV and WW were received in evidence.)

62. At a meeting of the Board of Directors of The National City Company held on December 28, 1931, action was taken as set forth in the minutes of said meeting (Exhibit XX).

282 Thereafter, on the 31st day of December 1931, on the books of The National City Company, accounts receivable and payable (Treasurer's Account Special) was credited, and "Surplus and Reserves" was debited in the sum of $150,000, the amount of Joseph Ripley's participation in the management fund distribution of July 1, 1929, thus reducing the Treasurer's Account Special as shown on the books, from $1,860,000 to $1,710,000.

(Exhibit XX was received in evidence.)

63. By journal ticket No. 196,377 adjustments were made on the books of The National City Company as shown in said ticket (Exhibit YY).

(Exhibit YY was received in evidence.)

64. At a meeting of the Board of Directors of The National City Company held on October 10, 1932, action was taken as set forth in the minutes of said meeting (Exhibit ZZ).

The indebtedness of L. E. Olwell, Vice-President of The National City Company, referred to in said minutes, represented moneys borrowed from the company and did not include $70,000 received by Olwell from the distribution from the management fund made in July 1929. Olwell withdrew from The National City Company in 1932, and was not in its employ on October 10, 1932.

(Exhibit ZZ was received in evidence.)

65. At a meeting of the Board of Directors of The National City Company held on December 27, 1932, action was taken as set forth in the minutes of said meeting (Exhibit AAA).

283 By journal tickets 11785 and 11786, adjustments were made on the books of The National City Company as shown in said tickets (Exhibits BBB and CCC).

(Exhibits AAA, BBB, and CCC were received in evidence.)

66. On December 30, 1932, after the "S. W. Baldwin Treasurer Special Account" had been written down to $1 and closed out of "Accounts Receivable and Payable," entries were made on a page in a loose-leaf memorandum book by Frank W. Maguire, Assistant Secretary of The National City Company (Exhibit DDD). All of the entries appearing on Exhibit DDD were made at the same time. Aside from the receipts referred to in paragraph 54 hereof, this was the only breakdown in the books and accounts of The National City Company showing the items included in the "S. W. Baldwin Treasurer Special Account," or the names of the individuals involved.

(Exhibit DDD was received in evidence.)

67. During the years 1921 to 1930, inclusive, petitioner received a salary of $25,000 per annum from The National City Company. Pe-

titioner's salary from the Company up to this time never exceeded the sum of $25,000 per annum.

At a meeting of the Board of Directors of The National City Company held on June 22, 1931, action was taken as set forth in the minutes of said meeting (Exhibit EEE), and the schedule attached (Exhibit FFF).

(Exhibits EEE and FFF were received in evidence.)

284 68. During the years 1929, 1930, 1931, 1932, and 1933, respectively, petitioner received from The National City Company the following sums:

Year	Salary	Management fund
1929	$25,000.00	$1,150,000.00
1930	25,000.00	0
1931	75,000.00	50,515.33 (See par. 59)
1932	75,000.00	0
1933, for two months—same rate		0

Subsequent to the year 1929 there were no further accumulations to the management fund and no distribution was made from the management fund, except the sum of $140,938.98, referred to in paragraph 59, which sum remained in the management fund after the payment of the distribution made in January 1929, referred to in paragraph 52. No portion of said distribution of $140,938.98 was applied against the payments made in July 1929, from the management fund. The National City Company never demanded or received of or from any of the parties who received payments from the management fund distribution, made in July 1929, any part of this distribution, except that action was taken in regard to Joseph P. Ripley as set forth in the minutes of December 31, 1931 (Exhibit XX) and that on December 10, 1933, Gordon Rentschler voluntarily paid to The National City Company $100,000, the amount which he had received from the distribution of July 1929. No payment
285 has been made by petitioner to The National City Company of any part of the sum received by him from the July 1, 1929, management fund distribution.

Counsel for petitioner objected to the following portion of said paragraph:

"No portion of said distribution of $140,938.98 was applied against the payments made in July 1929 from the management fund. The National City Company never demanded or received of or from any of the parties who received payments from the management fund distribution, made in July 1929, any part of this distribution, except that action was taken in regard to Joseph P. Ripley as set forth in the minutes of December 31, 1931 (Exhibit XX)."

on the same ground as urged against paragraphs 59 through 67, inclusive; objection overruled; exception taken.

69. With petitioner's knowledge and consent, F. W. Black, above referred to, in preparing petitioner's Federal income tax return for the calendar year 1929, did not include the item of $666,666.67 which appeared in petitioner's books as having been received by petitioner from the management fund of The National City Company on or about July 1, 1929.

(Portion of stipulation omitted, relating solely to 1930 transaction not up for review.)

100. In the calendar year 1930, dividends of $73,200 were paid
286 on the 18,300 shares of National City Bank stock registered in the name of Taff & Company and held by J. P. Morgan & Company as collateral for petitioner's loan account. In his 1930 federal income tax return petitioner reported $18,300 of this sum, being the dividend declared December 3rd, 1929, and payable January 1st, 1930, to stockholders of record on December 7th, 1929, and in her return for the calendar year 1930 Mrs. Mitchell reported the balance of $54,900, as dividends received from 18,300 shares of National City Bank stock. For the same year Mrs. Mitchell deducted as interest paid to petitioner during said year the sum of $158,417.01.

102. During the calendar years 1929 and 1930 petitioner's federal income tax returns were filed on the basis of cash receipts and disbursements.

Counsel for respondent stated that with this testimony respondent rested.

Petitioner's motion

Counsel for petitioner thereupon made the following motion:

Mr. WALLACE: Petitioner at this time desires, if the Court please, to interpose a motion that, upon the case as made by the respondent, the Board do not proceed further except to determine that there is no deficiency due from the petitioner upon the proofs for the calendar years 1929 and/or calendar year 1930, or either of them, and this because there has been no sufficient proof submitted by the Government to warrant a finding that petitioner wilfully and
287 fraudulently and with intent to evade a tax, understated his true income for the year 1929 in his income tax return for that year; also because there has been no sufficient proof submitted by the Government to warrant a finding that the deduction by the petitioner in that return of the loss established by the sale of the 18,300 shares of National City Bank stock was a pretended sale or other than a genuine sale; and, third, also because there has been no sufficient proof submitted by the Government to warrant a finding that the omission from petitioner's 1929 income as reported in his tax return of that year of the sum of $666,666.67 related to the management fund, was wilfully fraudulent or that it was not done in perfectly good faith; and, finally, because as a further ground the proofs submitted by the Government have not been sufficient to maintain any one of the three specific charges of wilful fraud and tax evasion that has been alleged and must have been established

in order to support the action of the Commissioner from which by this petition and proceeding an appeal has been taken to this Board, and that, because of all the foregoing there is no reason in law or upon the facts why the petitioner should be called upon to proceed further or offer affirmative evidence in explanation of the matters and things established by the proof submitted by the Government, or which that proof would have a tendency to show with respect to the return of either year.

The MEMBER (Judge ADAMS). It would be inappropriate and, indeed, improper for us to make any comments on the merits of
288 the motion other than to announce our decision upon it. The motion will be denied.

Mr. WALLACE. And we may have an exception, your Honor?

The MEMBER (Judge ADAMS). Yes.

Mr. WALLACE. Upon each of the specific grounds assigned by us?

The MEMBER (Judge ADAMS). Yes, upon each of the grounds assigned.

Mr. WALLACE. Thank you.

We will call Mr. Mitchell, the petitioner.

289 Evidence for Petitioner

Thereupon the petitioner, to maintain the material averments of the petition, introduced the following proof:

CHARLES E. MITCHELL was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. WALLACE:

Q. You are the petitioner, Mr. Mitchell? A. I am.

Q. And what is your age? A. Fifty-seven.

Q. From what college did you graduate? A. I graduated from Amherst College.

Q. With what degree? A. Bachelor of Arts.

Q. And in what year? A. 1899.

Q. Did you ever prepare your own income tax return or make any study of the tax laws or regulations? A. No, sir.

Q. While you were in college did you earn any money by working during any part of the time you were there? A. Yes, sir.

Q. When you went to the National City Company, as appears from the proof, in 1916, what was the size, nature, and extent of that company's operation? A. It had no activity other than the control of a portfolio of securities which aggregated between ten and thirteen million dollars.

Q. And what force was required to conduct its operations
290 at that time? A. It had a bookkeeper, a clerk and the stenographer, myself; they were the only force.

Q. What, if any, change occurred in the activities and extent of the operations of the company after you became its Vice President and then President? A. I quite promptly developed some activity in the

company as an underwriter and participator in syndicates and it became an issuer of securities. It was enlarged materially by the taking in of the security bond department of the National City Bank in the summer of the year in which I went to it, and then we absorbed the eastern business of N. W. Halsey & Company which liquidated its affairs and we began to develop a general investment banking business which grew with the years until the National City Company became by all odds the largest distributor of securities in the United States and one of the largest among the issuing companies.

Q. And its roster of employees and officers had increased to what extent from the time when you went to it? A. I think that, in 1929—I am speaking from recollection—that we had about, I should say, close to two thousand employes. The business was conducted along the line of a private investment banking house with about twelve officers who occupied the positions equivalent to partners in a private banking house. We had offices all over the United States and in many foreign countries.

Q. I don't believe that it appears in the proof thus far when you became President of the National City Bank, although the fact that you were President of the bank is already proven; will you
291 tell us when? A. I had entered the employ of the National City Bank as Vice President. I was made its President some four or five or six months after that. I acted as President of the National City Company continuously until 1929. I was made President of the National City Bank, I think, in May 1921, and occupied the position of President of both the National City Bank and the National City Company up to 1929 when, with a change in our executive organization, I became Chairman, a position created by a change in the by-laws, and became, as well, at that same time, a Chairman of the City Bank & Farmers Trust Company which was absorbed.

Q. And how were the affairs of the City Bank & Farmers Trust Company, so far as the accounts of private individuals and trustee conduct on their part are concerned, handled? A. They were handled entirely by a group of trained trust executives, that is, executives trained in the administration of trust accounts. That was not a phase of the business that came under the general accounting system of the institution at all.

Q. And to what extent did you act in the activities of those men who were handling those trust accounts? A. I never, to the best of my knowledge and belief, either looked into or attempted in any way to control or did control, or did give any indication of will with respect to the handling of such accounts.

Q. Now calling your attention to the consolidation that has been spoken of here between the Corn Exchange Bank and the National City Bank, the proposed consolidation, when, with reference to the signing of the agreement for consolidation, did you go to
292 Europe? A. The negotiations for the consolidation had been carried on between Mr. Frew, President of the Corn Exchange Bank, and our institution, I, handling the negotiations for the Na-

tional City Bank entirely. Those negotiations came to a favorable conclusion on the 18th of September, as I recall it, and they were announced in the paper that day, or the following day, and, with the tentative agreement that was evidenced by a passage of letters, I went to Europe, I think, on the 19th of September.

Q. And when did you get back from Europe, on that trip? A. I returned from Europe on the 22nd of October.

Q. 1929? A. 1929. If I may add——

Q. Go ahead. A. After I left, the trust agreements were drawn and were ultimately signed and recorded as of that date, October 1st, while I was away.

Q. Do you know about the market price of National City Bank stock when you left for Europe? A. It was about $460 or $465 bid, with a very strong market.

Q. And when you returned? A. When I returned it was selling at just about the same price, I think, $460 or $465 bid, in the meantime having been as high as $580, I think.

Q. And by the "meantime," you mean during your absence? A. Yes.

Q. Was there any sudden disturbance of large importance in the New York stock market, shortly after you got back? A. There was a disturbance before I got back. The market had shown a tendency to be soft during, I should say, practically all through October.

293 The day before I got back was rather a bad day in all the markets, and two days after I returned, notably October 24th is generally regarded as the day of panic. The markets at that time were extremely nervous and there was very heavy liquidation all along the line with very unsatisfactory response from buyers.

Q. And at that time and particularly on October 28th, how did this situation affect National City Bank stock? A. On the 28th of October—from the 24th on—the markets had been extremely nervous and on the morning of the 28th it became apparent that that was going to be another bad day and it proved so to be, with increasing nervousness as the day went on.

Q. Will you tell what you did during that day, in your own way, and what you found out when you got back to your office, at the conclusion of that day? A. Early that morning, after attending to my own desk, I went to the offices of the National City Company—I made my office in the National City Bank, and the National City Company occupied offices in the same building—I went to the offices of the National City Company to watch the opening of the market, to try to get my own view as to the conditions that might prevail during the day. I concluded that it was a day that I had to be very watchful of.

Coming from the trading room where I had been watchful of the opening of the market, Mr. Baker joined me and I spoke to him, evidencing the hope that things would not be so bad as to carry City Bank's stock below a parity of $450, against the $360 exchange price which has been explained already in this Court, and I left immedi-

ately for a meeting which I was attending at the office of
294 J. P. Morgan & Company. That meeting resulted in our calling in a group of the heads of the principal banks in New York for a consultation and to consider ways and means of stemming the situation which had become very acute. That meeting lasted until some time after noon when I went immediately to the offices of the Federal Reserve Bank of New York where I was a director and a member of the Executive Committee, and had an important luncheon meeting and, later, a meeting of the Executive Committee, to consider the general situation. I was closeted there until probably 4:00 o'clock, when I went back to the offices of J. P. Morgan for a second meeting with bankers. I was closeted there until probably close to 6:00 o'clock when I went back to the office and, after stopping at my own office, I went upstairs to the National City Company, where I met Mr. Baker and he told me the astounding fact that during that day and especially during the latter part of the day, that it had bought National City Bank stock very heavily in order to attempt to maintain that parity, and that they had bought something over 71,000 shares of stock at a cost in excess of $32,000,000. I told Mr. Baker that, with that news, I could be knocked over with a feather because it was a commitment that, at the moment, I could not see how we could finance and certainly it was a commitment that was exceedingly embarrassing because we could not borrow on National City stock from National City Bank, and it would be embarrassing for us to attempt to borrow on that stock in other banks, that a situation was presented that certainly presented many problems, and serious ones, that we had got to find the answer for
295 rather promptly. I went back to my office and talked to Mr. Rentschler, who was President of the National City Bank. He did not know of these purchases up to that time, himself, and expressed his surprise to me and, after talking with him regarding the problem and attending to some affairs in my office, Mr. Rentschler and Mr. Baker and I rode uptown together and discussed the matter further and when I left them I did so with the statement to them that I would have to think these things overnight, because something had got to be done by morning with respect to the difficulties as I saw them. I had an engagement that night with a banking group and I passed a rather sleepless night cogitating over this matter.

I think that is a complete statement of the day, Mr. Wallace.

Q. Why did you feel that something had to be done by the following morning? A. Well, as I tell you, there were many problems. Here was a tremendous commitment that had been taken by the National City Company which had to be handled and it was perfectly obvious that they could not be permitted to take on any additional stock involving a further load upon them. At that moment I could not see just how we could finance that which we had already committed ourselves for. I realized that they could

not be in the market the following day and realized that that stock had been pegged throughout that day at practically $450 a share, and nothing is more vulnerable in the market than the fact that it has been pegged, and certainly there would be a pressure from sellers and dealers the next day, a pressure so strong that unless there were orders coming in from somewhere to relieve that
296 selling pressure, the decline would be not only dangerous but might have in it the element of real disaster, bringing a reflection upon the institution that might be even terrifying to depositors. I saw the picture through to that extent, and realized that something must be done and done promptly to bring buying efforts into the market to stay what might be an avalanche and an extremely destructive course.

Q. What did you finally determine to do, and your reasons for that, and what did you do, the following day? A. Mr. Rentschler, the President of the bank, and I live close by, and it was our custom to walk down part way every morning to the office. He met me and we started early for our walk and I told him that my overnight cogitation had brought me to the conclusion that I would step into that situation myself and use my own credit to stay the flow, as dangerous as I saw it to be. I remember Mr. Rentschler and I stopping at the crossway at 65th Street and Fifth Avenue, by the traffic. I had told him my conclusion as we walked, a few blocks before, and I remember his saying to me right then and there that that, he felt, was a great mistake and he hoped that I would not do it, but I did conclude to do it. I saw no other alternative to protect the institution, and when I reached the office I got in touch with Mr. Baker, the President of the National City Company immediately and told him what I was going to do, and authorized him to start in with some orders a few points below the market and step down gradually, buying in a feeling way until we could test the market out, but always having some orders in that mar-
297 ket, not necessarily at the offering price, but below, with the idea that we would cushion the drop of the market by having orders always there and, having given him a notion as to how he should open the market and how the early buying should be handled, I went over to the office of J. P. Morgan & Company, seeing Mr. Lamont and Mr. Whitney, and arranged with them for a credit for myself up to twelve million dollars against which I could buy stock. I came back and advised them that that had been done, and the buying proceeded. I kept in touch with the market all day.

My understanding with Mr. Baker was that the company should not commit itself for a single dollar additional on account of the City Bank stock. That day, the market moved down. Mr. Baker and the trader of the National City Company had complete discretion as to buying, having a general idea that I had given at various times during the day that, as the stock dropped, especially as it dropped to its lower figures, about more than 100 points beneath the closing of the day before, as the buying was increased

and the selling orders began to dry up, and we felt a little buying coming into the market from the public, the market, before the end of that day, was turned and closed up from its bottom with a fair demand for the stock coming in from the public, and I felt that we had accomplished the end that we had set out to accomplish and that feeling was proven to be correct when, the following day, the demand for the stock carried the prices immediately up again. In other words, the great danger that I had foreseen had been passed.

298 At the conclusion of that day I was advised that my commitment had reached the sum of 28,300 shares, and that stock was delivered the following day, and the day following that, to J. P. Morgan & Company, under my account.

Q. And paid for how? A. Paid for by Morgan & Company to the National City Company out of the credit; they debited me out of the amount—the day that I had arranged that loan, I had gone to my office and had taken out 30,000 shares of National City stock, endorsed it in blank, as collateral for the loan, they to receive the additional stock as it was bought, as collateral for the loan.

Q. So, at the close of the night on which the deliveries were completed for the 28,300 shares, how much stock stood in pledge to Morgan & Company? A. My own 30,000 shares and this 28,300 shares, making a total of 58,300 shares.

Q. Will you give us some idea of your financial situation at that time, to enable us to see why you were able to get so vast a loan?

Mr. GREENBAUM. If your Honors please, we have been extremely patient; we have every desire to have the witness tell the transaction, but there must be some restriction, and we feel that this question is irrelevant and immaterial.

The MEMBER (Judge ADAMS). Of course, the petitioner witness is under a charge here of fraud. One of the questions we must determine is that of intent, and in that connection, the picture of all these transactions as nearly as we can get it. The rule must be more liberal, to bothe parties where issues such as those are in-

299 volved than it would be ordinarily. I think the witness should have the privilege of telling his issue in connection with these transactions which culminated in this litigation. You have been liberal. We have also. The objection is overruled.

Mr. GREENBAUM. We would like to make the statement that while it is understood that the Government has every desire to let the witness fully testify, our failure to object will not necessarily mean that the Government takes the position that the testimony given is either relevant or material.

The MEMBER (Judge ADAMS). It will not be so considered. The testimony will proceed.

Mr. WALLACE. I will ask the stenographer to please read the question.

(The question referred to was read aloud by the reporter as above recorded.)

The WITNESS. In the late summer of 1929 I recall figuring my position with some accuracy and I counted myself at that time worth in excess of $25,000,000. I was worth, in October something in excess of $30,000,000. I cannot tell you exactly my worth on the day that I made that loan, but I will say this, that I had 35,000 shares of National City Bank stock, 5,000 shares more than I put up with J. P. Morgan & Company. I had in the neighborhood of $5,000,000 of other securities in my box. I owned a substantial amount of real estate. My worth at that time was unquestioned for any loan of this sort.

300 By Mr. WALLACE:

Q. And what indebtedness, if any, were you owing at that time? A. I think I had a loan with the Guaranty Trust Company of perhaps five or six hundred thousand dollars, created temporarily only.

Q. And nothing else? A. Nothing else.

Q. Now, did you acquire these 28,300 shares in any sense as an investment? A. Obviously no. They were acquired under the stress of the moment and with an understanding which I had with Mr. Baker, the President of the National City Company, at the time, that these shares would be liquidated by the National City Company as they were able to relieve their own position, which was the thing that was the great matter of concern with me, and that day when I made this loan from J. P. Morgan & Company they raised the question as to how these shares would be liquidated, and I told J. P. Morgan & Company at that time that they would be liquidated by National City Company, as they were able to distribute through their distributing organization.

Q. You must have told them before why you wanted this loan? A. I did. They knew the facts, except that I did not disclose to them the amount of the shares which the National City had acquired, but told them that the National City was not, in my opinion, to acquire, and should not acquire, any shares of the National City Bank stock, and that I felt that I must step into the market to help.

Q. Will you tell the Court what was done actually in this
301 process of accomplishing the liquidation of the shares which you expected to liquidate, and what change occurred in the situation, if any, from time to time? A. I have already said that, immediately following the crucial day of October 29, 1929, the market for City Bank stock materially improved; the National City Company was the distributor of National City Bank stock. The salesmen of that company were constantly adding shareholders in large volume and were in touch with shareholders. The sales of the National City Company picked up immediately and were in volume, and their position was relieved quite promptly, that is, the volume of stock—their portfolio began to decrease. Mr. Baker advised me that he would apply large block sales, that is, where there were one, two, three or five thousand shares against this particular

account; and, as sales were made, I think that there were four or five separate sales running into volume, they were applied against my 28,300 shares, and The City Company notified me that they would be prepared to take delivery of that amount, and where they so advised me I wrote to Morgan & Company advising them that they should make delivery to the National City Company on such orders. That resulted in ten thousand shares sold, as I recall it, on the second, or the third, perhaps, of November, being taken from my block and deliveries were made as the City Company were called upon to make deliveries upon those particular sales, on the 4th and 5th, as I recall it.

Q. The 6th, I guess. A. Well, I do not pretend to be accurate; perhaps it was the 6th or the 7th.

302 Q. The 6th, I am advised. A. Well, on the 6th of November, this 10,000 shares being taken up and leaving me with 18,300 shares. It became increasingly evident, the early part of the week in which the shareholders of both the National City Bank and Corn Exchange Bank were to meet to ratify the agreement for consolidation, that with our stock selling beneath the so-called parity, if I may use that expression, of $450, the National City Bank stockholders would not approve of the merger. We saw that because proxies began to be withdrawn for that special meeting called to ask for approval of the merger. And by Tuesday night, the meeting of shareholders being called for Thursday, it was pretty clear to all parties connected with the National City Company that our shareholders would not approve of the merger, and we felt that the bankers who were in touch with us were trying to do something to stay the situation, themselves, and National City Bank stock became further weakened and the drop in the market was very substantial. The Corn Exchange stockholders met on the 6th or 7th, I think it was the 7th of November and approved the merger. The National City stockholders failed to have a quorum at their meeting and therefore the merger was not approved.

The market thereafter had a substantial drop. I do not pretend to give the figures—they are all matters of record, but I should say that the stock dropped during November to perhaps below $200. It may have been $215 or $220. That is a matter of record.

Q. Now you held these 18,300 shares for how long? A. I held the 18,300 shares until I sold them to Mrs. Mitchell on the 20th day of December 1929.

303 Q. Please go ahead in your own way and tell why you were moved to sell to her, and all that was done in that connection. A. Well, the National City Company relieved itself in part of its stock through the market, only in part, however. Along in the latter part of November, as I recall it, the staff of the institution, represented as they were by the Committee of Thirteen who presented the employes' matters to the officers, expressed a desire on the part of the employes that some plan be devised whereby they could purchase

stock at or about the then existing prices and have it carried for them over a period of at least a couple of years during which they could apply their savings to take it up. The Directors, after carefully considering the matter and especially being mindful that the price, if they were going to do it, must be one from which, in the long run, only an advance could be expected, as otherwise the plan would be more detrimental than beneficial to the morale of the organization and the loyalty of the organization, and the institution determined that they would make an offering, or cause an offering to be made, of stock to the employes, and they determined that $200 a share was a safe and proper price for the offering to be made. The market, I think, was not very far from that at the time, perhaps some points higher, but not materially so.

An offering of shares therefore was made to the staff. Some 50,000 shares were offered, and as evidencing the enthusiasm of the organization, the applications were more than double the amount of the offer. In other words, there were more than 100,000 shares subscribed for by the employes at that price.

304 Then the official family of the organization, vice presidents and vice presidents and cashiers and assistant cashiers, who were not eligible under the employes' plan, were anxious that they be given a chance. So, through the same piece of machinery which was developed to make this initial offering, which was what was called the stock-purchase plan corporation, some 10,000 additional shares were offered to the officers and they were heavily subscribed for at $220—20 points above the price at which the offer was initially made to the employes, and this was promptly, within a few days of the same time of the offering to the employes.

Through that plan the National City Company was very largely relieved of its possession of City Bank stock, although the outside market was an extremely thin market. As you will readily recall, in the months of November and early December 1929, the markets were generally demoralized and there was nothing that could be really called a strong demand for securities, and there certainly was no demand for National City Bank stock throughout the country, that could be called a demand.

While I had thoroughly expected at the time I bought that 28,300 shares and extended my credit for the benefit of the institution that that stock would be promptly taken up, it developed in my consciousness during the month of November and the month of December that here was stock that, by virtue of the circumstances that had prevailed, the National City Company had not, and I could not see how they could, take it up, and that that stock was definitely my stock and that I must treat it as my stock. I considered ways

305 and means of selling that stock. I knew very well that it could not be sold in the market. The market was not a broad enough market to take that stock without a substantial drop—I do not know what it would be, but perhaps 50 points in price. I could

not sell conscientiously while my associates and officers were buying under a plan. That disturbed me very much. I thought of disposing of it through the stock-purchase plan corporation which was selling to employes. That, I knew, would not look well, and that disturbed me. In other words, I was right in the thought that I had at that time that if anything should happen and I sold my stock to the employes that that was something that the employes could not forgive, although I did not expect it to go down, but very definitely expected it to go up.

Since I could not sell in the market without what I regarded as a certain drop developing to the institution itself, and vitiating in large measure the very advantages which had caused me initially to buy, realizing that I could not sell to the employees, I was presented with a real problem, and the thought occurred to me as to whether or not I could not sell that stock to Mrs. Mitchell because, here, I had a very large income from the year. I had my salary and I had the amount that I had received through management funds; I had the profit which had come into this account by virtue of the sale of the 10,000 shares at a figure substantially above my cost and resulting in a profit of approximately $650,000.

To present my true picture for that year, that stock bought for temporary purposes had to be sold, to record my true position of that year in my operations.

306 Mrs. Mitchell was a woman of means. I had considered Mrs. Mitchell as worth well in excess of a million dollars, although, as these sharp-pencil accountants get at her affairs and figure it out, I think it runs to $940,000 odd, but Mrs. Mitchell was worth approximately a million dollars at that time, aside from the ownership of house, furnishings, automobile, her own jewelry, and the substantial cash value in the insurance on my life which had been assigned to her and on which she had paid the premiums for a number of years. Mrs. Mitchell had owned City Bank stock always from the time that I became connected with the institution and she had sold stock, I think in 1928, and through that advance that occurred in 1929 she was always regretting that she had sold and lost the profit that she might have had—like a great many of us did in those days—and she would have had more composure about it in the light of what happened since, but her enthusiasm for City Bank stock was there, and was whetted by seeing the prices, as compared with the prices earlier. Her brother for many years had been a substantial holder of City Bank stock and was very much of an enthusiast regarding it. He talked to her again and again about it. Mrs. Mitchell, as I say, a woman of means, enthusiastic about this stock, was one to whom I felt I could talk about buying my stock.

Now, mark you, at that particular moment, I was borrowing approximately $6,000,000 from J. P. Morgan & Company. My stock that I had there had an equity something in excess of, I think, $4,000,000 above the amount of that loan. In addition I had secu-

rities which, at the then value, were worth something in excess
307 of $4,000,000. Putting it this way, I was borrowing $6,000,000
and I had securities enough to pay off that loan and $8,000,000 besides. That was approximately my condition at that moment. I felt that I certainly was in a position to carry that obligation for certainly a long time. This stock, however, was stock that was bought by me for temporary purposes only, and I felt that if Mrs. Mitchell would buy that stock and sell it in the next few months as the market advanced, which I felt at that time certainly it would, that she could make a profit out of that and ultimately pay any debt that was created by the purchase of that stock and perhaps take some of the stock that would still be within her means.

This situation I discussed with Mrs. Mitchell on the night of the 19th of December. The question arises: Did Mrs. Mitchell have money enough to pay for that stock? Most decidedly, no.

When I bought my original stock, a substantial block, I bought stock with a margin I believe of about 10 per cent, and that stock was sold to me by J. P. Morgan & Company. Here was a purchase that Mrs. Mitchell was contemplating making, merely of $3,800,000, and she had approximately $1,000,000 of worth besides that. So I told Mrs. Mitchell at that time that it was entirely a proper thing for her to do to buy it because she would gradually be able to sell a portion of that, cutting it down certainly to a volume well within her means to take up or to take the profit.

This, first, I say, I discussed with Mrs. Mitchell on the night of
the 19th. You ask if I urged her to buy it? I say that I told
308 her I thought it was entirely proper for her to buy it, and that
I felt she could make a substantial profit by so doing. Mrs. Mitchell was entirely agreeable to making that purchase and I said to her: "I do not want to make this sale to you until I have had an opportunity to lay all the facts in the matter before an attorney, and if he says it is proper and this sale to you definitely establishes this loss which it is necessary for me to establish by sale, then we will conclude it."

The next day I went to my office and asked a Mr. Forbes who is connected with the firm of Shearman & Sterling, who are our bank and institutional counsel, Mr. Forbes being the expert for that firm on tax matters. I asked him to come to my office. I told Mr. Forbes that I had a problem on which I wanted his advice. I told him the facts in general form as I have told them here, and asked him, if I were to sell this stock to Mrs. Mitchell, if that would be a proper sale to record the loss, and have that record effective in my income tax. Mr. Forbes said that it was entirely proper. The bona fide nature of it was discussed. Mr. Forbes knew, and my recollection is that I expressed to him the fact that Mrs. Mitchell was a woman of means. I did not discuss with Mr. Forbes exactly what Mrs. Mitchell was worth, nor did he ask me what she was worth. Mr. Forbes asked me why I did not sell this stock in the market. I told him just roughly, as I have told it to you at this time. Mr. Forbes

having said that this was a proper method by which I could sell and register this loss said: "Do you want me to help you draw the papers?" I indicated that I did. I had in my mind drawing
309 some formal papers but, as I said to Mr. Forbes: "I have had many, many transactions over a long period of years with Mrs. Mitchell and they have always been evidenced by an exchange of letters." He said: "That is just as proper as any other method, and suppose you go ahead and dictate, and I will interpose as I see the need."

Thus it happened that I drafted a letter from me to Mrs. Mitchell——

The MEMBER (Judge ADAMS). This is a pretty good time for a recess.

Mr. WALLACE. Before that, may I identify the Committee of Thirteen letter that you spoke of, the Employees' Committee of Thirteen? Will you look at the date, Mr. Mitchell, and say whether that had anything to do with the plan?

The WITNESS. This is a copy of that letter from the Chairman of that Committee of Thirteen to the Cashier of the National City Bank, requesting that such a plan be evolved.

Paragraphs 26 and 27 of Stipulation as follows and Exhibit 1 referred to therein offered and received in evidence:

"26. On November 18, 1929, the employees of The National City Bank and affiliated companies addressed a communication to Nathan C. Lenfesty, Cashier of National City Bank (Exhibit 1). On December 4, 1929, a stock purchase plan was put forth by its directors whereby National City Bank stock was offered to employees at the price of $200 per share.

310 "27. On or about December 20, 1929, 50,000 shares of National City Bank stock were allotted to that plan, and over 100,000 shares were applied for, so that each employee received less than 50% of the stock applied for, and thereafter 10,000 additional shares were allotted to officers of The National City Bank and affiliated companies at the price of $220 per share. This offering was also over-subscribed."

Q. In the course of your answer to the preceding questions, you said that you and Mrs. Mitchell had had, in the past, transactions accomplished by the exchange of letters in the course of all your business dealings? A. Yes, sir.

Paragraph 21 of the Stipulation as follows, and Exhibit 2 referred to therein offered and received in evidence:

"21. From 1918 to 1930 there were certain transactions between petitioner and Mrs. Mitchell. These were recorded in Mrs. Mitchell's books of account as follows:

"(a) In November 1919, Mrs. Mitchell loaned to petitioner $23,903.80. This loan was repaid by the petitioner on December 31, 1919.

"(b) On May 14, 1920, Mrs. Mitchell loaned to petitioner $125,000, par value of bonds which were returned to her by petitioner on December 23, 1920 (Exhibit 2).

311 "(c) On October 27, 1920, Mrs. Mitchell purchased 35 shares of National City Bank stock from petitioner and gave petitioner her check covering the purchase price of these shares.

"(d) From 1918 to March 1922 petitioner carried a loan or so-called 'Special Account' with Mrs. Mitchell, paying her interest of 3% on moneys loaned to him. This loan was paid off on March 3, 1922, by petitioner. At that time petitioner sold to Mrs. Mitchell securities having a market value of $12,524.60. Mrs. Mitchell paid for these securities by offsetting petitioner's indebtedness to her of $11,899.34, and giving to petitioner her check for the balance of $625.26.

"(e) On February 11, 1926, Mrs. Mitchell received $2,034.51 from petitioner representing the amount due her from petitioner in connection with the stock readjustment of International Telephone & Telegraph Company.

"(f) On August 30, 1926, Mrs. Mitchell sold to petitioner 250 International Telephone & Telegraph rights for $2,212.50. This amount was received by Mrs. Mitchell and deposited in her bank account at the National City Bank.

"(g) On October 31, 1929, Mrs. Mitchell sold to petitioner 500 International Telephone & Telegraph rights for $3,250."

312 By Mr. WALLACE (referring to Exhibit 2):

Q. That "Dear Elizabeth", of course, that was Mrs. Mitchell? A. Yes, sir.

Paragraph 33 of the Stipulation as follows, and Exhibits 3 through 41, inclusive, offered and received in evidence:

"33. During the period from 1918 to December 1929 Mrs. Mitchell participated in the following underwriting syndicate transactions:

"(a) Freeport Texas Syndicate, resulting in loss of $15,416.62 (Exhibit 3).

"(b) Illinois Central Syndicate—profit of $3,088.78 (Exhibit 38).

"(c) Inland Steel Syndicate—no profit or loss (Exhibits 9 and 10).

"(d) Westinghouse Syndicate—profit of $3,405.68 (Exhibits 11 and 37).

"(e) International-Great Northern Syndicate—profit of $2,643.45 (Exhibit 36).

"(f) Wrigley Syndicate—profit $537.33 (Exhibits 12 and 7).

"(g) Hupp Motor Syndicate—profit $501.49 (Exhibits 8, 35, 6, and 34).

"(h) Second Westinghouse Syndicate—profit of $3,386.02 (Exhibits 21, 32, 20, and 33).

"(i) I. R. T. Syndicate—profit $4,187.09 (Exhibits 31, AAAA, and 30).

"(j) Marland Oil Pool—profit $35,785.95 (Exhibit 18).

313 "(k) Famous Players Syndicate—profit $3,129.37 (Exhibits 17, 29, BBBB, and 16).

"(l) National Cash Register Syndicate—profit $10,000 (Exhibits 13, 27, 14, and 28).

"(m) Famous Players Lasky Syndicate—profit $1,809.70 and $452.42 (Exhibits 15, 19, and 26).

"(n) B. & O. Syndicate—profit $1,425.94 (Exhibit 25 and 39).

"(o) Mackay Syndicate—profit $7,513.75 (Exhibits 24 and 41).

"(p) Famous Players Syndicate—profit $991.88 (Exhibits 23, 22, and 40).

"(q) Shell Transport and Freight Company Syndicate—profit $8,694.64 (p. 18, Exhibit E id.).

"(r) Am. Steel Foundry 7% Cum. Preferred Syndicate—profit $750 (p. 14, Exhibit D id.).

"(s) Anaconda Copper Company—profit $10,335.70 (p. 112, Exhibit D id.).

"(t) General Motors Syndicate—profit $2,703.60 and $2,542.44 (pp. 42 and 46, Exhibit D id.)."

By Mr. WALLACE (Referring to Exhibit 3):

Q. Will you tell us whether, in the Freeport, Texas, Syndicate, comprehended by the letter just read, Mrs. Mitchell used her own deposits to take care of the loss? A. That is my recollection.

Mr. WALLACE. Mr. Greenbaum, can we agree that, in twenty
314 of the enumerated syndicate participations of Mrs. Mitchell, the allotment letters indicated by the exhibits were from Mr. Mitchell and all addressed to Mrs. Mitchell as "Dear Elizabeth"?

Mr. GREENBAUM. There is no question about that. I do not know the number, but whatever you say is correct.

Q. I now show you, Mr. Mitchell, the letter typewritten on yellow sheets, marked "Petitioner's Exhibit No. 4, for identification," (received in evidence as Exhibit 4) and I also show you a check marked "Petitioner's Exhibit No. 5, for identification," (received in evidence as Exhibit 5) both bearing date of June 7, 1923, and ask whose is the signature on the checks, if you know, and what relation there is between the check and the copy of the letter? A. This is a letter that was obviously written by Mr. E. F. Barrett to me, confirming the purchase of Mrs. Mitchell from me of 100 shares of National City Bank stock, as of June 7, 1923, and the cancelled check attached thereto is a check which I signed as attorney for E. Rend Mitchell, which is the amount paid to me and deposited in my account as the purchase price. It was deposited by me in my account in the National City Bank.

Q. Was that the record made of the transaction between you at that time? A. Apparently so; yes, sir.

Q. Was there anything said in that talk about the matter of tax stamps for the three writings, the letter writings that were then prepared? A. I have a recollection that Mr. Forbes spoke of stamps, and said they would have to be attached.

315. Q. Why were not they put on at that time? A. I just plain forgot to put them on.

Q. Was that the only thing you had on your mind at that time, Mr. Mitchell? A. Well, I would hardly say that. This was getting on toward the end of the year and I had——

Mr. GREENBAUM (interposing). I think that question can be answered with a simple yes or no.

The MEMBER (Judge ADAMS). I think the question is objectionable anyway.

Mr. WALLACE. Very good. Then, I withdraw it.

By Mr. WALLACE:

Q. Was there anything said between yourself and Mr. Forbes or any inquiry from him, as to how the payment was to be made? A. Yes, I told Mr. Forbes that I had told Mrs. Mitchell that I should be willing to carry that stock, that it was resting in a loan that was thoroughly protected and with additional collateral in my box to insure, as I saw it, the easy carrying of it, and that I should be perfectly willing to carry the obligation that she incurred by the purchase until such time as the stock could be sold. Mr. Forbes asked me how long I expected that she would hold the stock and I told him that I expected it would be sold probably within the next 6 months. And he said: "Then, let us definitely establish this as a nine-months carry, you agreeing to carry it for her for nine months."

And that was done.

316 Q. Was there anything said about the interest feature? A. The interest feature was discussed. I told Mr. Forbes that I had told Mrs. Mitchell that I would be prepared to carry her obligation to me at the same rate that I was called upon to pay J. P. Morgan & Company on the loan.

Q. What was said about the sale of shares at $220 or better, and applying the proceeds? A. As I recall it, it was Mr. Forbes' suggestion that I would best have authority from Mrs. Mitchell to sell that stock at a certain figure above the purchase price. I discussed that with Mr. Forbes and that figure was put into the letter, giving me authority to add on above a certain figure. It was discussed with Mrs. Mitchell when the papers were presented.

Q. Was there anything said about notifying Morgan & Company? A. Yes, Mr. Forbes said that of course I would notify Morgan & Company. I told him that it was entirely unnecessary as that stock was not in Morgan's name, or controlled in any way, but that the stock was in the name of Taff & Company, and in the name of the National City Company, and that if I notified them of the stock ownership, that those dividends would be paid directly by Taff & Company, which was the point under consideration.

Q. Is this letter which I now show you, which is the letter of the three letters referred to, and marked "Exhibit I," the letter of notification drawn to Taff & Company, and signed by you? A. That is the letter in which I advised them that these shares were the property of Mrs. Mitchell and that the dividends should be paid to her.

Q. In closing this transaction, after talking with Mr. Forbes, did you conclude in reliance upon the advice that he had given you? A. I did.

317 Q. If he had been of the opinion that you could not or ought not to sell to Mrs. Mitchell for any reason, would you have done so? A. I would not.

Q. After your talk with Mr. Forbes and the preparation of the papers that were prepared, what next occurred between you and Mrs. Mitchell in that matter? A. I telephoned Mrs. Mitchell to be sure that I could see her alone before dinner and I put the papers in my pocket and sat down with her and went over the papers. She read them in detail. I told her what Mr. Forbes had said and she signed the paper that she had to sign.

Q. What did she know at that time about your having borrowed, in October, from Morgan & Company? A. She knew that I had borrowed from Morgan & Company at the time that I had borrowed, and the fact that I was still carrying the loan from Morgan & Company at that time was known to her and I explained to her that I was entirely able to carry that stock for her and was entirely willing to do so, and she had all of the facts before her with respect to the matter at that time.

Q. Down to the time of the conclusion of this transaction and in the course of it, had there been anything said by anyone connected with it about your repurchasing the shares at any time in the future? A. Absolutely not.

Q. Had there been any intimation of that? A. No, sir.

Q. Did you then have any intention of ever repurchasing it? A. I certainly did not.

Q. Was it your intention at that time to pass title and ownership of the shares to her absolutely, so far as you could do so? A. It certainly was.

318 Q. From December 20, 1929, when you sold these shares to Mrs. Mitchell and until March 22, 1932, whom did you regard as the absolute owner of these 18,300 shares? A. Mrs. Mitchell was the real and unqualified owner of those shares.

Mr. WALLACE. I wish to offer at this time the documents enumerated in the stipulated facts.

The MEMBER (Judge ADAMS). Before you do that—the answer to the last question was not responsive. Your question was: "Whom did you regard," and so forth.

Mr. WALLACE. Yes, sir.

The MEMBER (Judge ADAMS). The reply of the witness was a conclusion of law in which he undertook to state who was, in fact, the owner, which is a very different matter from your inquiry. Therefore, that answer will be stricken out, and you can repeat the question if you desire.

Mr. WALLACE. Will you read the question, please, Mr. Reporter?

(The question referred to was read aloud by the reporter, as above recorded.)

The WITNESS. I regard Mrs. Mitchell as the owner.

(Petitioner's counsel offered Exhibit 42 in evidence. Respondent's counsel objected thereto on the ground that it was immaterial what

action Taff & Co. took with regard to this matter in making its report. Objection overruled, exception taken. Exhibit 42 received in evidence.)

319 Q. Were you keeping, or was there being kept for you, in 1929 or 1930, any books of accounts, or accounts, in which there was recorded anything in the nature of accounts receivable, that is, amounts owing to you from any other person? A. No, sir.

Q. What did you do or cause to be done with these three letters that were dictated as you have testified to, during your conference with Mr. Forbes, after they have been executed by yourself and by Mrs. Mitchell? A. The letter that I wrote to Mrs. Mitchell was turned over to Mr. Barrett who had to do with her affairs. The copy of the letter which Mrs. Mitchell addressed to me was also ledged with Mr. Barrett and the original was kept in my file. The copy of the letter addressed to Taff & Company was also kept in my files.

Q. Mr. Black is the gentleman who prepared your income tax returns, I believe? A. Yes, sir.

Q. What was his habit as to gathering information for the purpose of preparing the income tax returns? A. Mr. Black ordinarily came around shortly after the first of the year and got from my office all the evidence of transactions that I had had during the period that he was reviewing, and got essential papers such as my check stubs and other things necessary to making up an income tax return.

Q. When he was gathering this information after the end of the year 1929, and for the purpose of preparing the return for that year, did you tell him anything about the sale of the 10,000 shares out of the 28,000 made shortly after their purchase? A. Yes, sir.

Q. And did you also tell him about this sale
320 to Mrs. Mitchell of the 18,300 shares? A. Yes, sir.

Q. And what, if any, papers were given him at the time in connection with this matter of the 18,300 shares? A. I think copies of these three documents offered in evidence were given to him by my office.

To strengthen my last answer, Mr. Wallace, I will say that I know that I showed Black, in my office, the papers, and my recollection is that he took copies of those papers away with him. I could not answer that with positiveness, but that is my recollection.

Q. You know at least that you showed them to him? A. Oh, yes.

Q. Then I invite your attention to a photostat that is now marked "Respondent's Exhibit V," and I ask you to examine it, and calling your attention particularly to the typewritten last line, reading: "Difference due Mrs. Mitchell, $33,476.16"; will you tell us all that you know about that typewritten memorandum and all that you had to do with it?

The Witness. May I be permitted, your Honor, to go back with a very brief narrative to show my reason for asking for some of this data?

By Mr. WALLACE:

Q. I will ask you to tell in connection with your statement as to what you know about it, everything that you did that had any relation to the procurement of that memorandum. A. When the
321 market for National City Bank stock got very weak—Perhaps I better say that after the sale of this stock was made to Mrs. Mitchell there was a period when it advanced to some degree—I called that to Mrs. Mitchell's attention and called her attention to the fact that both she and I felt that the stock would go higher, but sales were not made. Then, the stock began to go down and it was impossible to liquidate that stock without very heavy loss and, all the time, my optimism was perhaps running away with me. I expected that that stock would go to higher prices, but it did not sell, and the fact that Mrs. Mitchell was taking at least a very heavy loss on this was a matter about which I worried a great deal, and the fact that we were not clearing out this stock with the rapidity that I had indicated to Mrs. Mitchell that we would, meant that she was carrying on these very heavy interest payments on her debit balance to me, payments that were far in excess of the dividends that she was receiving on this stock.

The matter did not bother me immediately, or for a few months. When the first payment of interest came due, Mrs. Mitchell's account was debited in the trust company and her own securities were sold sufficient to make up the debit, but because of my worry about this and the feeling of selfconsciousness about the matter, since I had been the seller to her of these shares, I tried very definitely to find a way to make gifts to Mrs. Mitchell in a way that would not disturb her, but so that her funds would not go down by the net withdrawal of this very large amount of interest that she had to pay.

I was making her gifts constantly, and with the idea that I
322 would try to protect her as far as I could against the loss. This was not a matter that I discussed with Mrs. Mitchell, as to why I was doing this, and for reasons that I hope will be obvious.

About this time, this memorandum which is part of respondent's exhibit in this case, dated Oct. 2, 1931—I was wondering one day about how my gifts to Mrs. Mitchell had checked up, how much of a burden she had really been under as a result of this purchase from me, and I asked my secretary to get from the trust company a statement of the receipts and disbursements, and as the result of that, very frankly, I remember that I got the information, but I do not remember this particular memorandum. I never asked them, but I will state this positively, that I never knew there was any amount due Mrs. Mitchell. That was certainly something put on there as the result of somebody else's cogitation and certainly not mine, and the fact that it was there did not mean a thing to me, but when it was shown to me, the first time, I was amazed that it was there, because I had never asked for that and it did not mean anything to me.

The MEMBER (Judge ADAMS). I think you have explained that.

By Mr. WALLACE:

Q. It appears in evidence that you received the first dividends paid on these 18,300 shares after December 20, 1929. That payment was made on January 5, 1930. You did not receive any of the subsequent dividends. Will you explain how you came to
323 receive that first dividend on January 5, 1930? A. Yes; if the Court please, this letter of December 20th which I wrote to Mrs. Mitchell—I want to call attention to the fact that this sale was made "Ex-January 1929 Dividend." Therefore, that dividend came to me, but all subsequent dividends went to Mrs. Mitchell, as they properly should, as the owner of this stock.

Q. Now, in connection with the matter of the payment of the interest and of the obligation described from her to you, I show you a yellow sheet writing dated April 1, 1930, from Lindsay Bradford, to you, and in connection with it a check of the same date, payable to you for $59,810.50, which is the amount mentioned as a payment of interest from Mrs. Mitchell to Mr. Mitchell, in paragraph No. 31 of the stipulated facts, the first amount, April 1, 1930, and I ask you whether that letter and that check illustrates the manner in which those interest payments from her to you were made? A. I assume it does, Mr. Wallace. I do not know that I always saw the letters that came in. The trust company—this has not been explained to the court, and perhaps it may be difficult—but shortly after the sale was made, Mrs. Mitchell's affairs were transferred to the City Bank Farmers Trust Company, with full powers of management, and at that time there were turned over to Mr. Lindsay Bradford, as Vice President of the City Bank Farmers Trust Company, all of the papers in connection with the sale to Mrs. Mitchell, and that was explained to him. This was a matter pertaining to me, as it did, and evidencing a loan, as it did, that I was carrying with Morgan & Company, I
324 was anxious to have handled by the man at the top of the Trust Company, so that it would not be spread through the organization, and Mr. Bradford knew from the letters lodged with him that this interest was to be paid to me quarterly at the same rate that I was paying to J. P. Morgan & Company.

The MEMBER (Judge ADAMS). Mr. Mitchell, the question was: Was this transaction illustrative of the manner in which this was handled.

The WITNESS. Yes, I assume that it was, but I can not say that such a letter as this was or was not always written. The interest was paid regularly, quarterly, to my office by the City Bank Farmers Trust Company, for account of Mrs. Mitchell, as interest on her debt to me.

(Exhibits 43 and 44 offered in evidence by petitioner.)

Mr. GREENBAUM. There is no objection to this going in as evidence of the fact that such a letter was written on April 1, 1930, and the

check sent. We do object to it if it is an offer to prove that it is illustrative of the manner in which these other payments were made, because there is no such proof.

The MEMBER (Judge ADAMS). There is no such proof of that kind, but it will go in for whatever probative value it has.

Mr. WALLACE. There is no proof that every one of them was that way.

(Exhibits 43 and 44 received in evidence.)

325 Petitioner's counsel offered the following paragraphs from the Stipulation of Fact, which were received in evidence:

"4. On October 28, 1929, The National City Company purchased 71,469 shares of National City Bank stock at a total cost of approximately $32,000,000. The purchases on October 28, 1929, increased the City Company's holdings of National City Bank stock from 12,202 shares to 83,671 shares. These purchases were made through and carried in an account on The National City Company's books known as the 'Sole Account.'

"8. At the time petitioner arranged for said loan (referring to the loan mentioned in paragraphs 5 to 7, both numbers inclusive of the Stipulation of Fact), he had no indebtedness to J. P. Morgan & Company, all his previous borrowings from J. P. Morgan & Company having been paid off (Exhibit NNN). (Exhibit referred to in this paragraph not introduced in evidence by petitioner but subsequently offered by respondent and received in evidence as Exhibit NNN.)

"15. Under date of October 1, 1929, The National City Bank and Corn Exchange Bank Trust Company, pursuant to the action of the directors of both banks, entered into an agreement of consolidation, subject, however, to ratification by the shareholders of both banks at the meetings to be held on November 7, 1929. The agreement of consolidation provided for the exchange of 4 shares of National City Bank stock for 5 shares of Corn Exchange Bank

326 stock. As part of the agreement, The National City Company agreed to purchase, at $360 per share in cash, any shares of Corn Exchange Bank stock which might be tendered it for purchase within twenty days after the date of consolidation. The effect of the agreement to purchase Corn Exchange Bank stock at $360 per share was to place an equivalent price on National City Bank stock of $450 per share. On November 7, 1929, the stockholders of said banks did not ratify said consolidation and said consolidation did not take place."

Petitioner's counsel offered exhibits made part of paragraph 32 of the Stipulation of Fact but not offered by respondent's counsel as follows: Exhibits 45, 46, 47, 48, 49, and 50. These exhibits were received in evidence.

"8. The closing bid and asked prices of National City Bank stock on the New York over-the-counter market were as stated in Exhibit 51 on the dates referred to therein."

Petitioner's counsel thereupon read into the record from page 95 of Mrs. Mitchell's ledger, identified as respondent's exhibit F for identification, the following, which was received in evidence:

"Headed C. E. Mitchell 1926, August 2, loan to Mr. Mitchell $190,000; September 14, reduction $50,000; 1927, February 8, reduction $25,000; July 20, reduction $15,000; 1928, June 1, settle-
327 ment of balance (see Mr. Mitchell's letter of June 1, 1928, filed in Securities Folder), totalling $190,000 under each of the two columns."

(Exhibit 51 was received in evidence.)

It was stipulated between petitioner's and respondent's counsel that all pencil notations appearing on Exhibit 51 were to be disregarded, all notations in ink being part of the exhibit.

Petitioner's and respondent's counsel stipulated that ownership certificates similar in form to Exhibit 42 were sent by Taff & Co. on the ensuing quarterly dividend dates, that is, April 1, July 1, October 1, 1930, to and including January 1, 1932, to the appropriate Government office, respondent's counsel not admitting the relevancy or materiality of the same.

Direction examination (continued) by Mr. WALLACE:

Q. Mr. Mitchell, at the close of yesterday we had spoken about the memorandum of October 2, 1931, that memorandum carrying the words, or some words like "difference due to Mrs. Mitchell," and you had explained what you knew about it. I show you the second memorandum of August 11, 1932, now marked Respondent Exhibit W. Will you just state as you did with respect to the Respondent's Exhibit D, which was the earlier letter I have just mentioned, or tell the Board all you know about this particular exhibit, Respondent's Exhibit W. A. For the same reasons expressed yesterday with
328 regard to the first memorandum, I asked my secretary to get from the trust company a memorandum of the disbursements made by Mrs. Mitchell and the receipts from the dividends and the gifts from me from the first of January, 1931, down through January, 1932, and he obtained from Mr. Peterson a memorandum which gave me what I wanted. In this memorandum the word "difference" appeared, $9,750, which was not what I asked for specifically, and carried no particular meaning to me. It was not what I was inquiring for, nor did he understand there was any difference I was asking for.

Q. And did he embody the detailed information you had asked for? A. Absolutely.

Q. And so you retained it? A. Well, I don't know what I did with it. It gave me the information I wanted and whether I threw it away or put it in my desk I cannot say.

At this point, a further portion of the testimony which it was stipulated Mr. George Sweeney would give if called as a witness was offered by petitioner and received in evidence as follows:

GEORGE SWEENEY:

"Q. Do you recall that you were shown two memorandums received by you as you stated from Mr. Peterson, dated as you recall it, one of them October 2nd, 1931, and the other August 1932? A. Yes, sir.

329 "Q. The one of October 2nd, 1931, is a photostat and is marked Government's Exhibit 33. (That, I believe, Mr. Greenbaum, is Exhibit V in this case.) Now I ask you, without looking as you did on Friday at the memorandum, do the very best you can, to state it as accurately as you can, what Mr. Mitchell said to you before you spoke to anybody at the City Farmers or anywhere else with relation to what Mr. Mitchell asked you to ask for. Try to reproduce as nearly as you can what Mr. Mitchell said to you. Do you get that clearly? A. Very clear. The best I can recollect, Mr. Mitchell called me to his desk and asked me to get from the City Bank Farmers Trust Company a memorandum showing the amounts of dividends received by Mrs. Mitchell; also the total amount of gifts which he gave to her, and the total amount of premiums paid by Mrs. Mitchell on the life insurance policies, and also the total amount of payments made by her in the covering of her loans. That is as far as I know of what Mr. Mitchell told me."

"Q. Now, I ask you whether in talking to Mr. Peterson or to whomever you spoke over the telephone, whether you asked him to furnish you with any statement of any amount of difference or otherwise that was due or owing from Mr. Mitchell to Mrs. Mitchell? A. No, I simply asked him for the facts which I have related to the jury.

"Q. And do you say to this jury positively that Mr. Mitchell never asked you to inquire for or of anybody for any statement purporting to show that Mrs. Mitchell was owing to Mr. Mitchell any difference? A. No.

"Q. That you are positive of? A. That I am positive of.

330 "Q. And does that apply in the same positive way with respect to the second paper which is marked 'Government's Exhibit 34'? (That is Exhibit W in this case.) A. It does.

"Q. And which is dated August 11, 1932? A. It does absolutely.

"Q. Now, have I given you every opportunity to say everything you want to say about anything that Mr. Mitchell said to you about the second paper? A. Yes, sir.

"Q. Did you on the second occasion, either in words or in substance, or in any way, request of anybody at the City Bank Farmers Trust Company to furnish Mr. Mitchell with a statement of difference or differences between Mr. Mitchell and Mrs. Mitchell? A. No.

"Q. In amount or otherwise? A. No."

"Q. Do you say that you didn't ask Peterson for a computation and a statement of difference due Mrs. Mitchell? A. I never asked him for that, no."

Respondent introduced into evidence a further portion of the testimony that Mr. Sweeney would give, if called as a witness, as follows:

"Q. Now, the first item, January 2, National City Company, $18,300, did you ask for the dividend? A. I asked for everything that was on that memorandum. (The memorandum referred to is Exhibit V in this case.)"

Thereafter there was received in evidence upon the offer by petitioner's counsel a further portion of the testimony Sweeney would give if called as a witness in response to a question as to what items he asked for on the memorandum of October 2, 1931:

331 "A. I called up Mr. Peterson and asked him to give me a memorandum showing dividends received by Mrs. Mitchell on the 18,300 shares and also for any gifts which Mr. Mitchell gave to Mrs. Mitchell, and any payments Mrs. Mitchell might have made. That would include premiums on life insurance policies and also payments of interest.

"Q. Did you ask Mr. Peterson the total of the amounts? A. I can't recall that; I can't definitely recall that.

"Q. Mr. Sweeney, I call your attention to the last item, difference due Mrs. Mitchell, $33,478.18; did you or not ask for that? A. I don't remember, no, I don't remember.

"Q. I want to know whether Mr. Peterson just wrote this down, difference due from Mrs. Mitchell, giving the amount, difference due Mr. Mitchell, $33,378.18, without you asking for it, or whether you asked him for it. A. I don't recall asking for it, no, I do not."

Direct testimony of Charles E. Mitchell resumed.

Direct examination (resumed) by Mr. WALLACE:

Q. Mr. Mitchell, there is already testimony in this case relating to a claim founded on, or supported by an opinion from the law firm of Cravath & De Gersdorf, and some other name but I forget, that was presented to the National City Company in March 1932. Will you please tell us all that you know about that claim,

332 how you considered it, and why you made it, and all you did about it? A. In 1931, the early part of that year, I had deposited with J. P. Morgan & Company as additional collateral to the loan I was carrying not only practically all of the securities, certainly all of the blocks of securities I had in my box, but I had given them in addition a mortgage on my home, and had come to the limit of my ability to put up additional collateral.

With the further decline in the market in 1931, this loan became under-margined, and by the summer of 1931 an under-water loan, that is a loan where the collateral was worth less than the amount of the loan itself.

In that late summer I was naturally a very disturbed man about it, and discussed it with Mr. Cary, who was one of the senior partners of the firm of Shearman & Sterling, and a man with whom I met constantly day after day and discussed my personal affairs, he having been the one of that firm who definitely knew about the status of my Morgan loan. It appeared to me, as I told him, that it was incongruous that the head of an institution such as the National City

Bank of New York should have an under-water loan, being indebted to a firm such as J. P. Morgan & Company with whom institutionally we were constantly having relations, and it bothered me very much, and I could not but feel that, considering the reason for my being in that incongruous position, was that I had come forward on December 20 with all of my resources and created that loan——

Q. You mean October 29, 1929? A. Yes, October 29, 1929—to protect the interests of the institution, whether there was not
333 some basis for asking the institution for some relief so that I might be taken out at least from this incongruous position, some relief given on that loan, some relief to me from the institution.

Those discussions continued from time to time until I should say November 1931, the early part of that month, when Mr. Carey said, "You know, in thinking of your affairs as well as the affairs of Mrs. Mitchell (with which he was entirely familiar) in as much as I represent, or am counsel for the institution, I think you should seek the advice of independent counsel with respect to the matter we have been discussing, in a claim in equity or otherwise that you might feel you may have against the institution. We will be very glad to cooperate with any counsel you may select, and see that they are given all the facts."

Mr. Cravath of the firm of Cravath, Henderson & De Gersdorf was a very old friend of mine, and I asked of Mr. Cary if he felt that firm would be satisfactory, and he would cooperate with it, and he said that he felt that the selection would be a very excellent one for me.

I saw Mr. Cravath and his partners and laid before them the situation, and they agreed to investigate the matter very fully.

Q. Did you give them all the facts of the situation at that time? A. I am coming to that. I gave them all of the facts regarding my loan and all of the facts regarding the sale of the stock that I had made to Mrs. Mitchell. I gave them all I could, and I asked them to confer with the firm of Shearman & Sterling, and to get from them access to the records and the key men in this particular situation so that they might interview them and get additional facts.

334 The inquiry by them was thus facilitated, and their investigation on the matter I believe was quite complete.

It took quite a considerable time, and the result of that was the sending to me of a letter or opinion which has been introduced in this record, with the suggestions from them that I forward it to the president of the National City Company for submission to the Board, which I did.

That claim was referred, or the opinion was referred to a joint committee selected by a board of the National City Bank and the National City Company, and was considered by them.

The general subject of my predicament, if I may call it that, I discussed from time to time during the latter part of 1931 and the

early part of 1932 with several members of the board of the Bank or the Company. What I asked from all of them was a consideration of the matter, and a consideration of the facts set forth in the opinion, that had been handed to me, and by me to the board, and by the board to this special committee.

I had but one meeting with that committee, and at that time merely stated to them that this was a situation I wanted them to consider, and to see if there was some relief that could be given to me. What I meant, this incongruous situation of having an underwatered loan, and thought that I probably should resign from my position with the institution. But, there was an opinion stating the facts of counsel, and to which I asked their consideration. As I said, that was the only meeting that I had with that committee.

335 Following a very brief presentation of the matter, probably not over five minutes, I left the committee room, and they had a long session that day, and from time to time I learned they had informal meetings of that committee and discussions with the president of the National City Bank and the president of the National City Company and others with regard to these facts.

It appears that in order that they might have an independent view, that is independent from any view that the general counsel of the institution might have, they called in eminent counsel, John W. Davis, who considered the matter, and I was told that he had finally expressed to that committee the opinion that he doubted very much that any claim should be presented of that sort, that was a legal claim that could hold water from the standpoint of the law; undoubtedly there was a moral claim, but as a legal claim, he felt there was none.

Thus it was, that in the spring of 1932, that I wrote a letter to Mr. Baker, which has been submitted in evidence, withdrawing this claim. That letter was presented to the board of directors of the National City Company and incorporated in their minutes.

Q. Had you stated fully to the Cravath firm, when you took their counsel, the facts with relation to your sale to Mrs. Mitchell of the 18,300 shares, as you have told them upon the witness stand? A. I presented to them all of the facts, and they had the papers evidencing the sale.

(Petitioner's Exhibit 52 offered and received in evidence.)

336 By Mr. WALLACE:

Q. Mr. Mitchell, testimony has been submitted to this Board concerning your repurchase from Mrs. Mitchell in March 1932, of the 18,300 shares of bank stock which you say you sold Mrs. Mitchell on December 20, 1929.

Will you, in your own way, tell this Board what moved you to repurchase those shares; when you did it, and how you did it? A. In the early part, I think, of March 1932, and when I was discussing

a number of matters with Mr. Cary of the firm of Shearman & Sterling in our office, he said, "You know we lawyers, and especially those having to do with trusts, are thinking and worried now about this proposed legislation having to do with a gift tax, and it has occurred to me that, knowing as I do the affairs of Mrs. Mitchell and yourself, if you were ever to forgive that debt, and that gift tax was in force, your affairs would become far more complex than they are today, and I think you ought to give some consideration to the forgiveness of that debt."

I evidenced to Mr. Cary surprise and amazement and complete lack of understanding of the matter, and told him that as a banker I just did not understand what he was talking about when he was talking about forgiveness of debt, but if he had something of that sort on his mind, I would appreciate it if he would talk to my then counsel, Mr. Swaine of the Cravath law firm because I did not feel capable of discussing the matter without knowledge of what he had in mind. He said that he would be very glad indeed to do so.

337 I spoke to Mr. Swaine about this conversation and he had a talk with Mr. Cary, the result of which was advice from Mr. Swaine to me that he felt that I should purchase those shares from Mrs. Mitchell, and should purchase them at the price at which I had originally sold them to her.

Mr. Swaine, with a full knowledge of all of the facts in the case drafted accordingly certain papers, a letter from me to Mrs. Mitchell, a letter from Mrs. Mitchell to me, a letter to Taff & Company, and a bill of sale.

I spoke to Mrs. Mitchell about it, and she evidenced to me as much surprise as I had evidenced when the matter was originally brought up, and said that naturally it would be a great relief to her, as it had been a matter of great worry to her, and if the lawyers approved of this, and I was prepared to do it, she would be naturally delighted.

Accordingly, those letters were presented, and I signed the letter that had been drafted for me, and she signed the letter that had been drafted for her signature, and the letter to Taff & Company which had been drafted for her signature, and the bill of sale, all of which were duly executed.

Q. May I interrupt you there to show you the respondent's exhibits Z, AA, BB, and CC, and ask you to state whether you identify them as the documents you have been referring to? A. These are the papers that were signed by Mrs. Mitchell and myself, and all of these were drafted by the firm of Cravath, Henderson & De Gersdorff, Swaine & Wood at that time.

338 Paragraph 40 of the Stipulation as follows was received in evidence:

"40. Exhibits Z, AA. BB, and CC were drafted by petitioner's counsel, Robert T. Swaine."

By Mr. WALLACE:

Q. Now, I interrupted you. I do not know whether you had finished the explanation you desired to make. Have you anything further you desire to state? A. I think I had finished subject to your question.

Q. Then I will come to this matter of the so-called management fund item.

Paragraph 49 of the Stipulation as follows was received in evidence:

"49. From 1922 to and including 1928, the distributions from the management fund of The National City Company and the dates thereof were as follows:

Date			Date		
7/13/21	$196,351.55		7/ 6/25	$305,000.00	
12/22/21	400,000.00		1/ 5/26	649,237.50	
		$596,351.55			$954,237.50
7/ 5/22	375,000.00		7/ 1/26	186,000.00	
1/ 5/23	615,000.00		1/ 5/27	508,000.00	
		990,000.00			694,000.00
7/ 5/23	150,000.00		7/ 1/27	540,000.00	
1/ 8/24	116,000.00		1/ 4/28	1,010,000.00	
		266,000.00			1,550,000.00
7/ 8/24	175,000.00		7/ 2/28	650,000.00	
1/ 7/25	785,142.92		1/ 3/29	1,450,000.00	
		960,142.92			2,100,000.00
			7/ 1/29	1,860,000.00	1,860,000.00
			1/ 2/31	140,938.98	[1] 140,938.98

[1] See Par. 59."

By Mr. WALLACE:

Q. I call your attention to the last item in this stipulation of facts just offered, January 2, 1931, $140,938.98. In two places on that line. Testimony has been introduced here concerning such a distribution. Do you recall it? A. Yes, sir.

Q. From what accumulation, of what year, did that amount arise? A. It arose out of the balance of the accumulations for the year 1928.

Q. I will ask you as to the seventeen different distributions specified in the paragraph, whether you know that was preceded by some form of authorizing resolution either of the executive committee, or of the board of directors of the company? A. It was so preceded.

Q. During the eight years before 1929 in which these distributions under this plan were made yearly and half yearly, was there any year when the entire year's accumulation did not produce
340 an excess beyond the amount of the mid-year distribution, thus providing further money for further distribution at the end of the year? A. That is correct.

Q. My question was, was there any year in which those moneys did not increase the amount and accumulation? A. No, sir.

Q. Will you tell the Board what was the business outlook as you saw it, for the National City Company as the conditions stood in June and July 1929, about the time when this distribution was resolved upon? A. It will be seen from the amount of the management fund accumulated at the end of the first half of that year, by

simple calculations that the earnings for the first six months had been in the neighborhood of $15,000,000, or at the rate of $30,000,000 per annum. In addition, however, the profits thus taken into the books, there were paper profits in the portfolio, and in contracts far in excess of the actual profit taken into account in that first six months, and it was my view, and it was the expression of a number of my associates on the executive staff and the board, that the prospects for 1929, from July on, should make that by all odds the largest profits in the history of the National City Company, and it was certainly my view, and I have good reason to think that it was the belief of others, that the profits of that year would certainly not be less than the amount indicated by the average of the first six months.

Q. Do you know whether in the beginning of the following year, 1930, there were actually for any number of months any accumulation in the fund for that year? A. Yes, there were accumu-
341 lations in the management fund for the first two or three months of 1930.

Q. But they did not last throughout the year? A. Well, the fund was one that was debited monthly with any deficit, as well as credited with any accumulation, and the debit against that fund in the period of four or five months of the year wiped out the accumulation that had been put in there in the first part of the year.

Q. Now, I want to call your attention to the financial standing and the standing in the business world of these gentlemen who attended that meeting of June 25, 1929, and who acted in the matter of the distribution at that time, as well as the gentlemen who constituted the board at that time, and on December 30 of that year. It appears that Mr. Swenson was in attendance at the June 25 meeting when the resolution for the mid-year distribution was passed—I think his initials are E. P. Swenson. Will you tell us who he was? A. Mr. Swenson was a private banker member of the firm, and senior of S. M. Swenson & Son, he having succeeded to that business established by his father. He was a man of very broad business experience. He had been one of the developers of the Freeport-Texas Sulphur, and he and his brothers, or the firm, at that time, owned, and whether owned by the firm or individually I do not know, one of the largest ranches in Texas, what was known as the "SMS Ranch," and they were engaged extensively in the cattle business there. Mr. Swenson had vast interests——

The MEMBER (Judge ADAMS). May I suggest that we simply
342 have a short historical sketch of these gentlemen, and we certainly should not go into the business activities, and to all of the holdings of each one of them, for the purpose you have in mind, which is quite proper, and it can be accomplished in a very few words.

Mr. GREENBAUM. If I may say, Mr. Wallace, in order to save time, that the fact is not disputed that these gentlemen who are directors of the National City Company were distinguished bankers and well known in the community.

Mr. WALLACE. And men of large affairs in the business world?

Mr. GREENBAUM. That is undisputed.

The MEMBER (Judge ADAMS). With that agreement you might pass on to something else.

By Mr. WALLACE:

Q. I would like to ask you as to Mr. Swenson, whether he had participated, or was entitled to participate in the so-called management fund distribution? A. He was not.

Q. As to Percy Rockefeller, had he participated, or was he entitled to participate? A. No, sir.

Q. How about Mr. Hugh Baker? A. Mr. Baker as the president of the National City Company and an executive officer participated in the management fund.

Q. How about John D. Ryan? A. No, sir.

Q. Mr. Beekman Withrop? A. No, sir.

343 Q. Mr. Brady? A. No, sir.

Q. Mr. Garrard Winston? A. No, sir.

Q. Mr. James A. Stillman? A. No, sir.

Q. About when did you learn that the accumulation in the 1929 funds as it was in October of that year would very likely disappear, and would have been wiped out by the later actual losses and write-downs and necessary reserves set up in November and December of that year?

Mr. GREENBAUM. May I ask that the question be read?

(The reporter read the pending question as follows:

"Q. About when did you learn that the accumulation in the 1929 fund as it was in October of that year would very likely disappear, and would have been wiped out by the later actual losses and write-downs and necessary reserves set up in November and December of that year?")

Mr. GREENBAUM. I still do not understand the question. I ask that it be reframed.

The MEMBER (Judge ADAMS). The question seems to involve a conclusion.

By Mr. WALLACE:

Q. I ask you then when did you learn of the likelihood of the hazard that the fund of 1929 would be nonexistent at the end of the year?

The MEMBER (Judge ADAMS). The question is still sus-
344 ceptible of the same objection. The question is, did he learn it to be the fact?

By Mr. WALLACE:

Q. Did you at some time before the end of the year learn that the fund was likely to vanish? A. Yes, sir.

Q. State the circumstances and what you did upon that situation developing? A. Well, I did not have to have any committee to tell

me that the profits were nonexistent, and there were losses resulting from the occurrences of late October and November.

The MEMBER (Judge ADAMS). I suggest thus far the answer is not responsive. He says he did not have to have a committee to advise him there was a loss. You had inquired of him what he did in arriving at the conclusion there would be a loss.

Mr. WALLACE. May I withdraw the question?

The MEMBER (Judge ADAMS). You may.

By Mr. WALLACE:

Q. Will you state the problem that confronted you in that situation with respect to the payment and distribution already made in July of that year? A. As I recall it in perhaps late November Mr. Baker talked with me at some length regarding the losses that were presenting themselves, and showing a great deal of concern with respect to the management fund. Mr. Baker about that time
345 took some long trips, and was not available at the office for any details of investigation work or study, and I asked Mr. R. M. Byrnes, a vice president of the National City Company, to make a study of a number of the major items in the balance sheet and earnings statement of the National City Company to determine for the board and for presentation to the board of the probable losses and necessary reserves that would have to be set up in the light of conservatism at the end of the year. Among the problems that were put up to him was the problem of the management fund. Mr. Byrnes certainly, and certainly Mr. Baker, and I would say others, but I cannot pick out in the rush of those days exactly the men, or tell in detail the conversations that took place, but the management fund and its condition was a subject of frequent conversation, and it was a subject which I discussed in turn with certain of the directors who regularly came to my office, or whom regularly I saw. The problem was a complex one. Here was the management fund that was authorized by resolution which provided that the board could distribute any part of that fund at any time, or from time to time. That board was vested with complete power over the fund. There were no contractual rights in the individuals.

The MEMBER (Judge ADAMS). Does counsel feel this is responsive to the question? If so, he may proceed.

Mr. WALLACE. We have got to show the problem before us.
346 The MEMBER (Judge ADAMS). If you think it is pertinent to your inquiry, go ahead.

Mr. WALLACE. I wish I knew of a way to shorten it, but frankly I do not.

The MEMBER (Judge ADAMS). Proceed with the examination of the witness.

By Mr. WALLACE:

Q. Mr. Mitchell, how frequently did the board of the National City Company meet? A. Once a week.

Q. This meeting that has been spoken of as the meeting of December 30, 1929, was, of course, the final meeting of that year? A. Yes, sir.

Q. Was the meeting at the end of the year comparatively important or unimportant? A. In many respects the most important meeting of the year.

Q. In brief, what made it important? A. It is important because the major items in the balance sheet have to be considered in more or less detail, the earnings for the year are generally estimated, and the disposition of those earnings determined.

Q. The minutes of that meeting declare that the chairman, yourself, discussed with the others the status of the management fund with particular reference to the distribution of the fund at the close of the first six months. Did you present the matter to the board? A. I did.

Q. Will you state in substance what your explanation to them was.? A. We had discussed the losses of the year, and the particular question had to do with relation of those losses of
347 the year to the management fund. I called attention that this very substantial payment had been made in July; that the recipients so far as I knew and was advised had considered that an absolute firm payment of that date. That while the management fund was a fund accumulated from month to month, it was actually a fund made up of the profits of the year, and it was difficult to see how there could be a fund established from the profits for the year when there were actual losses in the year, as the books established the facts. That on that basis there was on the one side a belief that the recipients in July should return to the company the amount they had received in July. On the other hand there was the argument and so deducted from the resolution establishing the fund that it was a firm payment to them.

Furthermore, that with the reverses that had come to many of the officers, they were unable to return the amount that had been paid to them in July; that here was a very complex problem that had been under discussion with Mr. Byrnes and Mr. Mayer, the controller of the company, who was preparing his books for the close of the year, and I had been advised that acting with the counsel of Shearman & Sterling, had prepared a form of receipt which at that time several of the men had been asked to sign in order that the controller might have the record at the close of the year, and if the board should act accordingly evidencing that as a debt of these men, but a debt that was payable from future accumulations in the fund, this being
a compromise of the views that had been suggested. That
348 under all of the circumstances I believed that probably was the best that could be done. I regarded this as a debt myself, a debt that could easily be liquidated from future accumulations in the fund. The board, considering the matter carefully, with all of the facts before them, determined that that was the solution that they would accept, and they authorized that a resolution should be

passed to that effect, the resolution itself to be prepared by counsel and incorporated in the minutes of that meeting.

Q. Was that done? A. It was.

Q. During any of the discussion down to that time, or down to the time of the settling on that method of adjusting the matter, had any consideration so far as you know been given to the income tax position of the recipients of the July distribution? A. I never heard any discussion at any time while that was being considered regarding the income feature as it pertained to the men themselves, or as it pertained to the company.

Q. When did you yourself sign the particular receipt you did sign? A. I signed it after the board had acted, either on that day or the next morning.

Q. Before the income tax feature came out, was any notice given of any kind by the company to the participants as to what amount the company had reported, or was reporting to the taxing authorities as having been paid by it during the year 1929? A. Yes, sir. I cannot say when, but substantially it is in the latter part of January the accounting division of the company sends to each and every man a statement of the amount that they have reported as
349 having the compensation of that man that they have reported to the Government.

Q. You say substantially. I take it then that that was done from year to year, that notice was sent out? A. Always.

Q. Is that the confidential notice that was read here in evidence, if you recall, or don't you recall? A. I don't recall it having been presented here. I presume it was.

Paragraph 58 of the Stipulation, with the exception of the last sentence, together with Exhibit 53 referred to therein, was offered and received in evidence, as follows:

"58. Prior to March 15, 1930, petitioner received a memorandum from The National City Company (Exhibit 53), which petitioner gave to Sweeney, his secretary, to be handed to F. W. Black, above referred to, who was preparing petitioner's federal income tax return. This paper was handed by Sweeney to Black. The National City Company on its federal income tax return for the calendar year 1929 did not deduct any part of the distribution of the management fund of July 1, 1929, as compensation paid to its officers or otherwise."

By Mr. WALLACE:

Q. The paragraph just read refers to the "National City Company on its Federal income tax return" for that year. What, if you know, was the practice as to the Company reporting to the taxing
350 authority what amounts it had paid out during the year to its employees? A. They made the usual report required by law.

Q. Either in the report to the taxing authorities, or in the notification of what had been reported to the taxing authorities, was this amount distributed in July 1929, included by the Company as being

payments to its employees? A. I am advised not although I never saw the actual report.

Q. It was your understanding there were not. A. It is my understanding there were not.

Q. Do you recognize this as the report that was furnished to you by the Company with respect to the amount that the Company was reporting as having been paid you during that year? (Handing document to witness.) A. I recognize that as a photostatic copy of it.

Q. The writing you have identified is now Petitioner's Exhibit 53. In the upper right hand corner of that memorandum appears the writing, "Sweeney hand to F. W. Black" with the initial "M" underneath it. Whose writing is that? A. That is my writing.

Q. Do you recall when, how, and for what purpose it was placed there? A. This was my custom, where any paper comes across my desk having to do with the making up of my income taxes, I pass it back to my secretary to be handed to Mr. Black who computed my income tax return.

Counsel for respondent offered the last sentence of paragraph 58 of the Stipulation, which was received in evidence, as follows:

"Without the benefit of such deduction, the federal income
351 tax return of The National City Company for 1929, showed a net loss of several million dollars in excess of $1,860,000."

Q. You have said something about the lawyer's opinion in connection with these payments and how they should be treated. What do you know about it, who gave the opinion, and what did you understand the opinion to be? A. I learned subsequent to the first of the year that counsel had advised that the amounts paid in July would not be included in the Company's expenses of that year, it being a bill receivable on our books, and I learned from at least two of the officers that they had talked with Mr. Garrard Winston, one of the senior partners of the firm of Shearman & Sterling, who were counsel for the Company, and a member of the board of the National City Company, and he had advised that this amount should not be included in the individual returns of the officers. It is my recollection I talked to Mr. Winston myself, and confirmed that view of counsel.

Mr. GREENBAUM. May I ask that the time be fixed on those two respective conversations?

The WITNESS. It is quite impossible for me to place the time. Sometime certainly after the first of January and before the first of March.

By Mr. WALLACE:

Q. And your 1929 return was prepared in that respect in accordance with what you understood was the opinion of counsel? A. It was.

352 Q. Did you rely upon it in signing and causing to be filed that return? A. I did.

Q. If the Company had included the $666,666.67 item paid you in July under the mid-year distribution, and had declared it in the notice sent you by the Company, what would have been your action with respect to your income tax return with regard to that item as to reporting it? A. I certainly should have reported it as an item of income.

Q. If the company had been advised to so include it, if Mr. Winston had advised those distribution payments should be included in the 1929 income tax returns of the recipients, what would you have done about it in your own particular return?

Mr. GREENBAUM. I object to the question as being hypothetical. I do not object to the form, but I do think it is objectionable.

Mr. WALLACE. We think this witness is entitled to tell this Board at this time what his state of mind was at that time, and what he would have done in respect to it. It is not conclusive, of course.

Mr. GREENBAUM. He has testified affirmatively what he did do, and stated it was upon the opinion of these attorneys. Now, this question raises the point as to what he would have done if something else had happened.

The MEMBER (Judge ADAMS). Ordinarily the objection of counsel for the respondents would have been good. It is certainly a sound legal proposition. However, I overrule the objection.

353 Mr. GREENBAUM. May I have an exception?

The MEMBER (Judge ADAMS). You may have the exception. The question may be answered.

A. It is a double question as I understand it. If counsel of the National City Company had advised the company to include that item as an expense, and the directors of the company had done so, the Treasury officials of the National City Company would certainly, and beyond question have followed the advice of counsel, and they would have reported this item as income, and I have already said if they had reported it as part of the money as paid to me as compensation during 1929, I would have certainly treated it as income in my 1929 return.

Q. Now, it appears already in evidence that out of $140,000 distribution that was made on January 2, 1931, you received $50,515.52. Why was that sum not applied to reduce your obligation to the company resting upon the payment of July 1929, distribution? A. Because the receipt that had been given recited that that amount owing was payable out of future accumulated distributions in the management fund, and this was not such a payment. This was a payment of an accumulation that had occurred in 1928, and not subsequent to the 1929 mid-year payment.

Q. What effect as to the obligation between the company and yourself was accomplished by the writing down to $1, as appears in evidence, upon the company's books of this item of $1,860,000 that was the subject of distribution in July 1929?

354 Mr. GREENBAUM. If the Board please, that is objected to as calling for a conclusion, what was the effect of that action.

Mr. WALLACE. I am getting the witness' understanding about it, regardless of whether it was right or wrong.

The MEMBER (Judge ADAMS). I am perfectly willing for him to state what his understanding was.

By Mr. WALLACE:

Q. You may answer. A. It had no effect.

Q. Why not, as you understood it? A. Because, while there was a reserve first established and later applied to these receivables as carried in the books of the company, when that was applied, it was specifically stated in the resolution of the board of directors that the obligation of the recipient of the distribution in July 1929, and the debt owing by him as represented by his so-called receipt, should in nowise be affected by the application of reserves to the general ledger account of the National City Company.

Q. Were you in the habit of directing the details as to how the bookkeeping transactions should be recorded? A. No, except on general ledger items of large moment. I had them in mind always, but how they would be handled was a matter that the controller had direct management of.

Q. And in this specific case with reference to this particular entry we are talking about, did you direct it? A. May I understand what you mean by "this particular entry"?

355 Q. Writing down the S. W. Baldwin special account to $1. A. It was directed by the board of directors.

(Portion of testimony omitted relating to 1930 transactions not involved on this appeal.)

Q. I am going back now for a moment to your 1929 return. Do you know whether that return was ever examined by any internal revenue agent? A. Yes.

Q. When and by whom? A. My recollection is it was examined some time in the early part of 1931.

Q. Were you requested in connection with that examination by the revenue agent to furnish any papers, and if so, what papers?

Mr. GREENBAUM. To that we object. We submit the facts in regard to the examination of the return in 1931 have no bearing on the issues involved in this case.

The MEMBER (Judge ADAMS). I will hear the purpose of the testimony.

Mr. WALLACE. We think that it is important to know whether he withheld or concealed information as to this matter.

The MEMBER (Judge ADAMS). I think for that purpose it is admissible, when he was first challenged, or first called upon, if he disclosed it, for whatever it is worth. Objection overruled.

Mr. GREENBAUM. May we ask that an exception be noted?

The MEMBER (Judge ADAMS). You may have the exception.

356 By Mr. WALLACE:

Q. Did you furnish him with the papers he desired or copies of them? A. I showed the agent the papers I had in my office which

were the originals of the latter that had passed from Mrs. Mitchell to me, and the copy of the letter that I had written her, and that I had written Taff & Company.

The MEMBER (Judge ADAMS). I think that question was susceptible of a categorical answer. Read the question.

(The reporter read the pending question as follows):

"Q. Did you furnish him with the papers he desired, or copies of them?"

The MEMBER (Judge ADAMS). Q. Did you furnish him with the papers he desired or copies of them?

The WITNESS. I furnished him—

The MEMBER (Judge ADAMS). Did you or did you not?

By Mr. WALLACE:

Q. The inquiry was not what you furnished, but did you furnish what he wanted to see; what he asked for. A. Yes, sir.

Q. Now, will you tell us what he asked for and what you furnished? A. He asked to see the papers in regard to this sale.

Q. The sale to Mrs. Mitchell? A. The sale to Mrs. Mitchell, and I called for my file and received and showed to him the original
357 of the letter from Mrs. Mitchell to me and a copy of the letter I had written to Mrs. Mitchell and Taff & Company on December 20.

Q. I show you now Respondent's Exhibit G and Respondent's Exhibit H and Respondent's Exhibit I, and will ask you whether or not those are the papers or letter you then showed him? A. Those are the papers referred to in my last answer.

Mr. WALLACE. I think, may it please the Board, that concludes the direct examination of the witness. I shall want, however, the privilege, if we find any matter overlooked, of recalling the witness.

(Portion of testimony relating to 1930 transactions not involved on this appeal omitted.)

Cross examination by Mr. GREENBAUM:

Q. Mr. Mitchell, we will begin, if you do not mind, with December 1929. You remember yesterday you mentioned the figures made by, I think you used the expression, sharp pencil accountants with respect to Mrs. Mitchell's assets. Now, those figures were $940,000 approximately. What did you figure her assets as at that time? A. I think I said yesterday, and I repeat, that I consider Mrs. Mitchell at that time worth around $1,000,000.

Q. And now, if you have got the printed stipulation before you, it might be helpful. If you will look at paragraph 17, you will probably recall that is the paragraph that purports to enumerate and itemize Mrs. Mitchell's assets. A. Yes, I recall seeing that.
358 Q. You see the item, cash in bank $32,027.80? A. Yes.

Q. You remember on that day, that is on the 19th, and this refers to the 20th, you had given Mrs. Michell $33,000? A. I remember that is in the record, yes.

Q. That would mean obviously that without that check of $33,000, Mrs. Mitchell's assets would have been that much less, and she would have had no cash on that date, do you follow me? A. She would, unless she had sold something among her stocks and bonds which were salable at that time, if that is what you refer to?

Q. What I am saying is, the day before this she actually had $33,000 of assets less than she had on that day, that is prior to the time you gave her that check? A. Yes, I think that is true.

Q. Had you made any payments to her, or presents to her recently? A. I think that they are enumerated here, aren't they? I cannot answer that offhand.

Q. There was no substantial gift made her just before this? A. I cannot answer that, but mark you, that $33,000 was not a gift.

Q. So I understood you to say. That was the final payment on a previous obligation of $300,000. A. Yes.

Q. I am not questioning that, but it is your recollection that you did not substantially add to her assets shortly prior to this date, did you? A. I think not. The record, which I understand is here, will show.

Q. Yes, and she had the assets enumerated there, the stocks and bonds, and miscellaneous personal effects, including jewelry,
359 and so forth, that had been hers for quite awhile before, I take it? A. Oh, yes.

Q. For several years before? A. It was accumulated over the years, and I think that it would run to a very high figure.

Q. You are not saying there was any substantial value to these items other than the stock and bonds, are you? A. I certainly do, yes.

Q. Do you say there was any substantial value to the items referred to there as jewelry? A. Yes.

Q. How much, or approximately how much? A. I could not tell you exactly, but my recollection is it was insured for, just those things, were insured for $85,000.

Q. You mean the jewelry? A. Yes.

Q. That included other things like wearing apparel? A. It included only jewelry.

Q. What was there besides that? A. I should judge her works of art and furniture would be perhaps $150,000.

Q. How about books or paintings, that includes paintings and works of art? A. Probably, it is difficult for me to determine that accurately. I am giving a round figure of $150,000. It would certainly not be less than that.

Q. And those were Mrs. Mitchell's property? A. They were.

Q. And she had owned them a considerable length of time? A. Well, they had been built up during the years, and doubtless some of it within the past year prior thereto.

Q. Was there a substantial amount of that owned two years at least before? A. A substantial amount of it; yes.

Q. The bulk of it? A. I would not say the bulk of it. That is difficult for me to answer.

360 Q. What would you say she might have been worth in those assets two years before we would say, just roughly, Mr. Mitchell? A. I cannot answer a question of that kind, Mr. Greenbaum. It is impossible for me to do so.

Q. Largely in excess of $100,000, was it not? A. Yes.

Q. I will ask you, Mr. Mitchell, in whose handwriting the words, "Elizabeth R. Mitchell," are on that paper I hand you? A. That is in my handwriting.

(Respondent's Exhibit YYY was offered and received in evidence.)

By Mr. GREENBAUM:

Q. What do you mean by registration of loss—you used that expression several times this morning? A. The establishment of loss.

Q. And I take it by that you make no distinction between an actual sale, and the sale, as you put it, to register a loss? A. I certainly do make a distinction. I think that the registration of a loss must be a definite sale.

Q. Do you make any distinction between the sale for the registration for loss purposes and a sale for any other purposes? A. I do not.

Q. Now, as I understand it, you felt that you were placed in an unfair position in 1929, at the end of the year, because you found yourself with a profit, at least a paper profit on this 10,000 shares of stock which you had sold, and you did not actually consider the profit yours, isn't that your statement? A. I do not think I said that I was placed in an unfair position, did I, Mr. Greenbaum?

361 Q. That is my word, I do not want to put words in your mouth. As I understand your position, you claimed that you did not expect any profit on that 10,000 shares, that you were doing that to help out the stockholders of the bank, isn't that true? A. That is correct.

Q. And, therefore, you felt that you found yourself in the position of being forced to pay a tax on some $600,000 worth of profit in reference to the sale of that 10,000 shares? A. That would have been the case; yes; if I had not had a definite loss to establish against my income of that year upon a sale of property, I would have paid a tax on that property.

Q. And isn't it your thought that you wanted to get the true picture, in other words, the true picture of the situation, and that did not give a true picture because it put on you an apparent profit that was not yours, isn't that it? A. I think I said, not referring entirely to the $650,000, but to my entire income of that year.

Q. Didn't you make any distinction between that particular so-called profit on this 10,000 shares, and the other items in your so-called income for that year? A. No, sir.

Q. That was all part of the picture? A. Why, certainly.

Q. Well, now, what do you mean by the true picture; you mean unrealized losses because of the fact the market had gone down on those securities? A. I think if in that year I make a $1,000 and lose a $1,000, the true picture is, I have received an income of zero. On the other hand I have had an income of $1,000, and I have a loss which I have not established upon a sale, and, therefore, show
362 an income of $1,000, and then that is an untrue picture of my actual condition at the end of that year.

Q. I understand. Well, to get the true picture, wouldn't it be necessary in your mind to balance that against the unrealized profits on the items which had gone up from the beginning of the year? A. Those profits that had been taken.

Q. But, in the case of loss, to get the true picture, you should consider the actual values regardless of whether they had been sold or not, is that the point? A. No; the assets, if they had a loss, a paper loss in them, that paper loss had no reference unless it was covered by a sale which recorded the actual condition.

Q. But, to get the actual condition, or the true picture, isn't it a fact you would have to consider what the unrealized profits were too? A. If one wished to take the unrealized profits, that would increase the income obviously.

Q. And it would affect the true picture, wouldn't it, Mr. Mitchell, of how a person stood for that given year? A. Your question is so academic that the answer is obvious. If a man has a profit, and he takes that, that becomes a real profit, and if he has a loss and takes that, that becomes a real loss and would have to place it in the portfolio at the end of the year, if you got the actual condition between paper profit and paper loss.

Q. I think you have made a fair criticism to my question, for it is academic. But, as a matter of fact, didn't you have some unrealized profit in that year? A. I do not recall at the moment.

Q. How about the 35,000 shares of the National City Stock
363 unsold at the end of 1929? A. They would have shown as against—supposing I had sold those at the end of 1928, and bought them back on the first day of January 1929, then, I would have had a substantial loss in those shares at the end of 1929.

Q. Aren't you the one that is getting academic? A. I don't think so.

Q. Did you sell them at the end of 1928?

Q. Mr. Mitchell, did you have a large unrealized profit at the end of 1929 on the 35,000 shares of National City stock? A. I cannot tell you exactly what that 35,000 shares of stock cost me, Mr. Greenbaum.

Q. It is in the stipulation that it cost you $200 a share, you recall that? A. Yes; and I think it was $200 a share.

Q. You had most of that before there was a five to one split? A. Yes; all of it I think.

Q. Didn't it cost you considerably less than $200 a share? A. Yes; I think it did.

Q. In getting what you call the true picture for 1929, it is a fact that you did not consider the $666,000 from the management fund as really being in the nature of income, isn't that true? A. Precisely; I had felt that that was a debt owing. I had no definite knowledge as to whether it would be income, or whether it would be a debt until the board had acted at the end of that year.

Q. You mean for tax purposes? A. Yes, sir.

Q. And isn't it a fact that about the middle of December 1929, you considered that was not income? A. I had no possible way of determining whether it was income, or whether it was a debt, not until that matter was brought before the board and determined. There was no possible way for me to reach a determination on that.

364 Q. Well, you had determined you were going to register a loss as you put it by sale of 18,300 shares to Mrs. Mitchell; you had determined that on or about the 19th or the 20th of December, isn't that correct? A. Yes, sir.

Q. And in computing the amount of loss you would take on that, it was your objective to get a figure which would wipe out this income of yours, wasn't it? A. I do not believe I figured at that time with any accuracy at all. I knew on this transaction there was an enormous loss, and thought it would probably wipe out all of my income, but, as far as sitting down by myself or with anybody else and figuring whether that was an accurate calculation, no, that never occurred, Mr. Greenbaum, and I personally had no such thought on my mind at that particular time. That was only natural that I should not do so.

Q. Well, you knew that the amount was approximately $2,800,000, didn't you? A. At the time I sold the stock.

Q. And you knew, of course, approximately the amount of income which you would have had for 1929? A. In a general way; yes.

Q. Not even within $600,000? A. Oh, yes; I recognize that is a large item, but if the board had determined that was income within that year, or as of that year, I should have paid tax on it, and very readily paid tax on it.

Q. But, isn't it a fact that on or about the 19th of December 1929, that you had figured in your own mind that by reason of the sale of this 18,300 shares, the net result would be you would not be required to pay a tax? A. I do not think I gave that particular matter any degree of consideration. I will say, if I may assist you,

365 that from my own standpoint I considered that that advance in July was something I owed the company.

Q. You always considered that? A. That I owed the company; that it was an advance to me subsequently determined as to its repayment, as to the method of its repayment.

Q. Didn't you always feel that the officers of the company and you could claim that was a final payment? A. I felt that was a very close question. By some it was definitely asserted.

Q. I am asking you what you felt, Mr. Mitchell? A. I understood you to say, didn't the officers?

Q. No, the question was if you did not feel the officers of the company could consider that as a final payment? A. I beg your pardon?

Q. I am sorry. Do you understand the question now? A. Yes.

Q. What is the answer. A. You asked if I felt they could consider it a final payment to themselves?

Q. Yes. A. I say no.

Q. I will ask you if you recall testifying before the Committee on Banking and Currency of the United States Senate, and making this statement, referring to page 1785 of the reported hearings of that Committee:

"Quite frankly I always felt that the officers could claim that as a final payment because the directors could distribute at any time during the year such proportion of the management fund that accumulated."

I ask you if you gave that answer? A. I do, and I reaffirm
366 it. I do think the officers could have established that claim. That is the statement I made there.

Q. Now, Mr. Mitchell, do you remember being asked this question, and making this answer in the case of United States vs. Charles E. Mitchell, referring to page 1363, the first question is, and that question was clear to you, because it was repeated several times, "Then the apparent income to be wiped out was somewhere in the neighborhood of $2,800,000, that is so, isn't it? A. Yes, sir."

Q. Did you so answer, do you so recall? A. If it is in the record, I so answered.

Q. The next question is, "Now when you figured what you wanted to wipe out was about $2,800,000 of income representing your apparent income for the year, you had already made up your mind that the moneys received from the management fund in July were not to be treated as income, isn't that so? A. Yes; that is true. I did not have in mind my income tax, if that is what you are figuring. I had in mind my income, and I certainly did not consider that that was to be income."

Did you so testify? A. That is exactly the point I testified to here, and I reaffirm it.

Q. Then if, when you made the sale to Mrs. Mitchell on the 19th or the 20th of December you did not consider the management fund payment of $666,000 income? A. No, sir; I did not have it in mind as income, but the determination of that I reaffirm could not be made until the board of directors had considered the matter and had acted.

Q. But it was your opinion, and I do not want to repeat, but
367 I want to get it clear, it was your opinion it was not income? A. Yes; it was my opinion it was not income.

Q. Wasn't the transaction between you and Mrs. Mitchell really a transaction of convenience to reduce your income? A. It was not.

Q. Do you remember saying it was? A. It was a sale.

Q. Do you remember saying it was before the Senate Committee? A. I repeat it was a sale. As I recall it before the Senate Committee to which I see you are now referring, I think I said at that time it was a sale that was made to record the loss for income tax purposes.

Q. I ask you if this question was not asked you, and I refer to page 1812 before the Senate Committee of Banking and Currency:

"Senator BROOKHART. That sale was just really a sale of convenience to reduce your income?

"Mr. MITCHELL. You can call it that if you choose.

"Senator BROOKHART. Is that right?

"Mr. MITCHELL. Yes; it was a sale for that purpose, but the buyer would be able to make a profit."

Do you remember so testifying? A. I do.

Q. Now, Mr. Mitchell, coming to the year 1930 do you recall when Mrs. Mitchell's account was transferred to the City Farmers Bank—I think you said this morning that Mr. Bradford was managing that account? A. I do.

Q. Now, those securities and the investment thereof were placed under his control and management? A. Yes; broadly speaking. He was the chief officer in connection with that division.

368 Q. And wasn't it a fact that about that time the City Farmers Bank, of which you were the chief officer, was building up a managing department for accounts of that kind? A. Yes, sir.

Q. And it was your desire and purpose to take Mrs. Mitchell's account and let this gentleman in that department handle it? A. That is correct, sir.

Q. Were they ever consulted in regard to the 18,300 shares of National City stock as to the desirability of selling that? A. No; I think not.

Q. That was not under their control? A. No, sir.

Q. That was kept separate for your judgment and decision? A. For Mrs. Mitchell's decision. That was not put in open management control account.

Q. What was the reason for the discrimination between that item and all of the rest of her securities? A. This was put in there in the way as I explained yesterday, Mrs. Mitchell relying upon me, and not having it get into the record so that everybody in the Trust Company who came in touch with it would have a knowledge of my loan with J. P. Morgan & Company, and be able to know of my personal affairs.

Q. I am not talking about everyone in the Trust Company. Mr. Bradford knew about it? A. Mr. Bradford and possibly three or four of his associates knew all about it.

Q. Therefore, why couldn't Mr. Bradford, without breaking any confidence in that respect, have advised with regard to that? A. Mrs. Mitchell was prepared to advise with me with regard to that.

369 Q. That was treated differently from the others; you were alone the one to advise on that? A. Yes, sir.

Q. And that was provided in the letter of December 20th, do you recall? A. There were certain provisions made in that letter whereby I had the privilege of selling that stock for her above a certain price.

Q. And as I understand you, the reason you did not sell in the open market in December 1929, one of the reasons was you felt that would depress the market, is that right—I am referring to the sale of the 18,300 shares? A. If it had been sold in the market, it would have depressed the market.

Q. You say that the market was in a more crucial position, in regard to that stock than it was in the first week of November 1929? A. Oh, very much, very much.

Q. Which was worst? A. In the first week, in the early part of November, that is in the early days of November, there was, I would consider, a very bad market for National City Bank stock.

Q. That was just before the merger? A. Between the crash and the merger.

Q. And the merger fell through on November 7th because then the parity, that is the level in these stocks could not be maintained? A. Yes, sir; fundamentally so.

Q. You did not sell your stock on the open market, even though it was not a good market in November? A. Yes, sir; but the buying orders in the market were very substantial at that time, while in December the buying side of the market was extremely thin.

370 Q. You did sell 10,000 shares of the 28,300 shares before the merger failed to go through? A. Before it had become evident it would not go through.

Q. Was it before it became evident it would not go through? A. Yes, sir.

Q. When did that become evident? A. It became evident on, if I recall the dates correctly, on the night of November 5th.

Q. And the sale was a day or so before that? A. The sales, as I recall, were November 2nd and 3rd.

Q. You saw the difficulties a day or two before November 5th, didn't you, that it was becoming apparent that the merger was not going through? A. They became real on—I should say on the 4th and 5th. That is when it became evident, and not until the night certainly of the 4th.

Q. Now, coming back to the year 1930, the market went up quite materially in the early part of 1930 as to National City stock? A. Yes, sir.

Q. Do you recall what level it reached in the next few months? A. I rely upon the record.

Q. That is undisputed, Mr. Mitchell, it went up to about 254, and I think 253 to 255 relative bid and asked; that was within a couple of months? A. The December date.

Mr. WALLACE. What date please, Mr. Mitchell?

Mr. GREENBAUM. It is in the exhibit exactly what the date was—the exact date is February 14, 1930. I believe there is no question

about that, but that was the market, 255 to 257, if I am correctly informed.

Q. Now, had there been a sale on that date obviously there
371 would have been a very substantial profit to Mrs. Mitchell, would there not? A. Yes, sir.

Q. Then am I correct in saying that would have been in the neighborhood of $770,000, figuring about a 40 point rise on 18,300 shares? A. Yes. Of course, you realize we are talking about 18,000 shares and you are talking about a quotation in which is certainly not over a 100 share market. You can never figure that in that way.

Q. I fully realize that, and it is also fair to say that you can never say that you can sell at the high? A. Quite so.

Q. I realize that fully, but in spite of that fact, without unduly arguing this, isn't it a fair statement to make that that stock could have been liquidated within the next few months at a very substantial profit; isn't that a fact? A. It could—yes, sir; but whether it would or not would cause me to remind you of the atmosphere that existed with regard to securities at that time almost universally. Remember there were more people that were buying at that time that got hurt by the collapse that came a month later, than probably were hurt in the October crash.

Q. What you mean is that everybody thought it was going up more, is that it? A. Yes, sir.

Q. When you sold that stock, as you said, to Mrs. Mitchell in December 1929, wasn't it your intention that that was not to be a permanent investment? A. That was my intention, and that was her intention.

Q. And wasn't it the intention that it was to be sold out within the next few months? A. Yes, sir.

Q. And you told that to Mr. Forbes? A. Yes, sir.

372 Q. Did you make any effort to sell any part of the stock when the market went up in the early part of 1930? A. No, sir.

Q. Now, in 1929, you said yesterday when you testified, that when the sale was made in December, you had no thought then of worry on the ground that the interest payments from Mrs. Mitchell to you would exceed the dividend payment, isn't that what you said? A. I hardly think I said that.

Q. I don't want to misquote you. A. I said—I did say that I did not expect Mrs. Mitchell would hold the stock for a long term investment account, and only as she held it would the interest payments amount to the high figure at which they were running. I expected Mrs. Mitchell would sell that stock, or some of it during the next few months, and as she did so her interest payments would obviously come down. I did not expect Mrs. Mitchell to hold it that long. I did not expect the interest account to run to a point to exceed the dividend account, simply for that length of time.

Q. Was it just a question of time? If it was just a short time, it was not an item that would trouble you? A. Quite so.

Q. The interest payments, I believe, run in the neighborhood of $190,000, which Mrs. Mitchell was to pay you, and the dividends payment off the stock were in the neighborhood of $72,000, isn't that correct? A. I will accept your statement of it. I haven't the figures definitely in mind.

Q. Well, it was 18,300 shares, at $1 per share quarterly? A. Yes.

373 Q. And it is just four times that? A. Yes, but just because you are trying to get me accurately, it is not just the $72,000, the figure you mention, when I say I take your statement.

Q. Mr. Mitchell, do you know whether that $33,000 payment made on December 19, 1929, remained in Mrs. Mitchell's account until the first interest date, that is April 1st? A. I do not know at all.

Q. The books would show that, I presume? A. Yes, sir.

Q. Was that $33,000 wholly disconnected with the fact that she would have to make payment to you for interest in the next few months? A. Wholly.

Q. Did it have anything to do with the fact that she would have to pay the insurance premiums on the policies on your life? A. No, sir.

Q. Now, I do not mean the nature of the payment, because, Mr. Mitchell, I believe that is stipulated. That payment was the balance of the $300,000, but I am asking you as to the time, the occasion, the time of payment, the fact you made her that payment of $33,000 on December 19, was that wholly disconnected from this sale? A. Wholly.

Q. It is just coincidental, it happened to be on that day that you spoke to her? A. I think so. I had not spoken to her at that time, you bear in mind.

Q. I did not say that, but I said on the day you spoke to her? A. I think the repayment was made the day before, the 18th.

Q. Then the stipulation misstated the fact, and it should be corrected? A. That is my recollection.

374 Q. Didn't you make note of the fact that on April 1, 1930, and again on July 1, 1930, when the dividends were received, and the interest payments were made, there were overdrafts in her account in the City Farmers Bank? A. I knew that. I heard there was an overdraft in her account on April 1st. It disturbed me very much.

Q. What did you do? A. I did nothing about it at all. The matter was being handled by the City Bank Farmers Trust Company.

Q. It disturbed you, for you did not like the picture of the wife of the chairman having an overdraft in her account in the institution, wasn't that it? A. Well, only in part because overdrafts in trust management accounts are not at all unusual where the trust company holds a volume of securities which it is within their power to sell at any time that we find advantageous——

Q. Mr. Mitchell, I would like to ask you, why were you disturbed with that overdraft? A. In part for the reasons that you mention, and in part because it brought into my consciousness that she was already having to diminish her wealth by virtue of her burden that she had taken on in making this purchase.

Q. Now, beginning with the July 1, 1930, interest payment, it was a matter of concern with you that she should not have an overdraft; isn't that correct? A. I should say in part; yes.

Q. Then you began making these gifts to her so as to keep her intact, and not let her be out of pocket by reason of the difference between the interest item and the dividend item? A. I disliked to see her decrease her wealth.

375 Q. And, if you recall, on June 4th, you gave her a gift of $42,500 approximately net value or market value of securities. If you will look, Mr. Mitchell, at paragraph 32 of the stipulation, if you do not recall, then I will ask you if that gift was made with that in mind? A. I always gave Mrs. Mitchell gifts on that particular day, as this was my wedding anniversary, and I think undoubtedly I increased the amount I would ordinarily give her in order that her wealth would be built up, with the knowledge on my part of the added strain upon her by virtue of these interest payments.

Q. On your previous wedding anniversaries, had you ever given her a gift of that size? A. I cannot answer that, but I should think, as I have said, that was unusually high for the reasons stated.

Q. Now, July 1, and I think you had better look at paragraph 32, July 1 was the next date on which payment was made. That was no anniversary, was it, or birthday? A. No, sir.

Q. You note that was an item of $25,000, and entered in her books as proceeds of a loan. As a matter of fact was that payment a loan, or a gift? A. I have no knowledge.

Q. Was it ever paid back? A. If it was what it purports to be here—I do not know just what it means, Mr. Greenbaum.

Q. That item appears on Mrs. Mitchell's books, entered in there that way as proceeds of a loan, and I was asking you whether or not you knew whether that loan was ever paid back; can you explain that? A. I cannot. I do not know what that means.

376 Q. Now, do you know it is a fact that the dividends received by Mrs. Mitchell on 500 shares of National City Bank stock, are not in her income account, do you know that? A. I only know that from hearing it stated. Whether any payments went into the income or principal account, I never did know.

Q. Don't you know that the payment from the 18,300 shares were transferred from income account to the principal account? A. I never knew it until I heard it in court; no, sir.

Q. Didn't you give instructions that that should be the method of handling it? A. I did not.

Q. I will ask you to look at this letter dated July 1, 1931, addressed to you from the City Farmers Bank, and ask you if that refreshes your recollection? A. Only as to the receipt by me of the check.

The fact that it says that they have debited a like amount to Mrs. Mitchell's principal account meant absolutely nothing to me.

Q. You note from that letter that it was done in accordance with your instructions? A. I think it says "In compliance with your request we enclose check drawn to your order for $49,000." It does not say they have debited a like amount to the principal account at my request, and it was not so.

Q. Then your explanation is that means your request was in relation to sending the money to you, and not in relation to any entry in regard to it? A. Decidedly so.

(Respondent's Exhibit ZZZ was offered and received in evidence.)

Q. Mr. Mitchell, I will ask you if you know by whose in-
377 structions the dividend payments on the 18,300 shares in Mrs. Mitchell's account went into the principal account? A. I have not the slightest idea.

Q. Now, you recall this document that has been referred to several times, which is known here "Sweeney's Memorandum of October 2, 1931, Exhibit V." That was dated October 2, 1931, and shows the difference due Mrs. Mitchell of $33,478.18. What did you do after you got that memorandum? A. I do not know what I did. The figures in the upper part of that memorandum were what I had asked for, and the information that I wanted was gained from it.

Q. Didn't you make a payment of $25,000 to Mrs. Mitchell's principal account within a few days after this? A. I would have to revert to the record.

Q. If you will be good enough to do that, and look it up—October 6—isn't it a fact that you paid her $25,000 on that day? A. I did apparently.

Q. Was that her birthday? A. It was my birthday.

Q. That was your birthday? A. Yes.

Q. Had you ever given her a present on your birthday before of $25,000? A. No. I think I have explained the reasons for all of those gifts, Mr. Greenbaum.

Q. You state that you did not ask Mr. Sweeney for the "difference" on that, is that correct? A. I did not.

Q. The only thing that you did not ask for on this memorandum, the only information not requested, was the word, is that it? A. I asked him for a statement of the "out" payments and the "in" receipts.

378 Q. And what was the difference between what you asked him for, and this paper, except for the word "difference"? A. This paper says, "difference due Mrs. Mitchell." There was nothing due Mrs. Mitchell.

Q. Was there anything else on there not requested by you? A. I do not think there was.

Q. Now, look at the second one, Mr. Mitchell, the one dated in August 1932. Without the word "difference", subtracting one side of the column from the other, it shows, I will not say "difference due", Mr. Mitchell, but the resulting figure of $9,700, doesn't it? A. Yes, that is on this memorandum.

Q. What did you do after receiving that? A. You mean, what I did with the paper?

Q. No; isn't it a fact you paid Mrs. Mitchell $10,000 immediately after receiving that memorandum? A. I think I gave Mrs. Mitchell, or I had given her on her birthday, which occurred in the early days of August, a payment of $5,000, and I think subsequent to that I gave her another check for $5,000.

Q. If you will look at paragraph 32 of the stipulation, I think there appears there the first two items each for $5,000, totaling $10,000, and will ask you if that refreshes your recollection that immediately after the receipt of the second memorandum, the one of August 11, 1932, you paid her $10,000?

Mr. WALLACE. One moment, if the Board please. The witness has just answered that question that he paid her one item of $5,000, and another one of $5,000, and I think all of us are able to total those payments to be $10,000.

379 The MEMBER (Judge ADAMS). The objection will be overruled.

By Mr. GREENBAUM:

Q. The question was if immediately afterwards you did not do that? A. It would so appear here; yes, sir.

Q. Now, what was the total gifts you had made to Mrs. Mitchell as far as you recall, say the three years preceding 1929, or the three years preceding December 20, 1929? A. I do not know, but in jewelry and in special pieces of furniture and one thing and another, they were quite substantial.

Q. It was not anything as large as the amounts you had paid her later? A. No, as I just told you, there was a special reason why I had done that.

Q. You were making more money, and had far greater assets than in the years previous? A. Yes, sir.

Q. For instance, in 1928 compared with your income for 1930, how much more would you say you were making? A. Substantially more, obviously. It is in the record.

Q. I do not know that it is in the record, Mr. Mitchell. A. I would be perfectly ready to grant that I had been making substantially more then than I was making in 1930.

Q. Without going into the details, can you say that it is a fair statement, and if I am wrong, please correct me, that you were making at least $2,000,000 a year in 1928 and 1927—is that approximately correct? A. I could not say so, I can't answer that without checking the record.

380 Q. You remember that your receipts from the management fund alone, we will say for 1927, were upward of $1,000,000, wasn't it—I mean from the City Bank, and the National City Company? A. I do not recall the figures. I should have to revert to the record.

Q. Maybe, Mr. Mitchell, it will refresh your recollection of this item, and I will take your best recollection on that. If you will be kind enough to look at folio 277 of the document I am handing you, at the top of the page, and after you have refreshed your recollection, give us approximately what those figures were? A. Well, this is a question by opposing counsel.

Q. I am just asking you—I am trying to help you to see if you can refresh your recollection? A. It only refreshes me in my recollection with regard to the question of counsel. He asked me if my income was not close to $1,300,000 in 1928 and close to that in 1929, and I did say—I see the first answer "I would question that."

The MEMBER (Judge ADAMS). The question is, does that refresh your recollection?

The WITNESS: It does not.

The MEMBER (Judge ADAMS). Then it has accomplished its purpose.

By Mr. GREENBAUM:

Q. Isn't it a fact in 1928 you received from the management fund of the National City Company $566,000? A. If that is in the record.

Q. You are not disputing these approximate figures? A. I could not dispute any figures.

381 Q. To simplify the matter. I believe you testified this morning, or yesterday possibly, that you figured you were worth possibly $30,000,000 in 1929? A. That is correct; yes, sir.

Q. And it is a fact you were insolvent in 1932, isn't that a fact? A. That is a fact; yes, sir.

Q. And the conditions went along a little progressively from 1929 to 1932? A. Yes, sir.

Q. Now, why did you not tell Mrs. Mitchell that she just need not make these interest payments to you, if you wanted to keep her estate intact during 1930 and 1931? A. She owed me the interest.

Q. Why did you go through this devious round about method of holding her intact?

Mr. WALLACE. Wait a moment. We object to that characterization, and ask that the question be stricken from the record.

The MEMBER (Judge ADAMS). The objection will be overruled.

Mr. WALLACE. Exception.

The MEMBER (Judge ADAMS). Exception.

By Mr. GREENBAUM:

Q. Why did you go through this devious round about method, and why didn't you just say to Mrs. Mitchell that she need not pay you any interest? A. Well, I presume that might have been done, but as Mrs. Mitchell owned this stock, she owed me the money on it, and there was every reason why she should pay me interest, and if I had not made this gift to her, this interest would have undoubtedly been paid directly out of her personal account substantially.

382 Q. Didn't it ever occur to you that the same result could have been accomplished by just telling her that, "you need not pay me interest any more," didn't that occur to you? A. No, sir.

Q. Now, Mr. Mitchell, did Mrs. Mitchell ever buy on margin before? A. I do not know what you mean by "buying on margin"—if you mean she had a loan before?

Q. I do not consider myself competent to advise you about buying on margin. Put it another way, did she ever have to borrow to buy stock before; did she ever do that? A. I do not think she ever did borrow before this, no.

Q. Then you recall this testimony in regard to this first syndicate agreement, so-called in the exhibit that has gone in evidence? A. I do.

Q. Were not those syndicates in your name—the participation of the syndicates in your name, rather? A. Most always; sometimes I think not.

Q. Weren't those participations offered to you as the chief executive officer of the National City Bank? A. They were not offered to me as such, no.

Q. I misstated that. I do not want any implication from that, but I mean in view of the fact that as an individual you were known because of your large financial interests in that way that you were enabled to obtain this participation? A. I think I was known to be a man of means who was regularly investing, and who would be able to take up that syndicate participation that was offered to me, and I was offered and received on an investment basis.

Q. Wasn't it just a question of letting Mrs. Mitchell in on this, declaring her in on this? A. Well, declaring her in on that,
383 she always took full responsibility and liability for every syndicate participation that I put her in.

Q. I realize that fully, but wouldn't it have been a very pleasant thing for anyone else to have participated?

(Objection by petitioner's counsel sustained.)

Q. Isn't it a fact that you were asked this question, on page 1533, and made the following answer:

"Q. Did she (Mrs. Mitchell) put up any collateral, or was it just a matter of declaring her in? A. Declaring her in the participation?

"Q. And when they wind up, you give her her proportionate share? A. Yes."

A. What testimony is that?

Q. I am reading a statement that you made before the District United States Attorney on March 18, 1933. Do you recall that? A. I recall making an appearance before the United States District Attorney, or his assistant.

Q. Do you recall the first question? A. I do not recall it, but I will stand by it.

Q. Regardless of that, isn't that about a correct statement of the situation? A. Certainly, I never would have given her a participation, or a part of a participation——

The MEMBER (Judge ADAMS). Just a moment, Mr. Mitchell. He asked you if that was not a correct statement of the situation. Was it or not?

384 The WITNESS. May I have his previous question?

(Thereupon the reporter read the pending question as follows:

"Q. Regardless of that, isn't that about a correct statement of the situation?")

A. It is not as full a statement as I would prefer to make in answer to your question; no, sir.

By Mr. GREENBAUM:

Q. I am perfectly willing or agreeable to have you add anything to that that you want to right now. In what way isn't that a fair and clear statement? A. Your question indicates that, what did you call it, letting her in on it, "declaring her in" to use your words——

Q. It was not my question, Mr. Mitchell, these are your own words, "declaring her in"? A. Declaring her in, to stick to those words, I would certainly not declare anybody in on a participation on my own interest, on any investment matter, unless that person was able in my opinion to assume the liability incident thereto. Mrs. Mitchell was so able.

Q. And in certain of these syndicates, wasn't it really a matter of paying of commissions that you were receiving, commissions for your participation in the syndicate?

Mr. WALLACE. I object to the question as indefinite.

By Mr. GREENBAUM:

Q. I will make it a little clearer if I can. You recall the
385 syndicate in the Interborough Rapid Transit. In that there was a profit of $4,187.09, referred to here at the bottom of page 14 of the printed stipulation? A. I do not recall the syndicate well enough to answer that question.

Q. I show you this letter, and ask you if this refreshes your recollection, that there was a 4 per cent. underwriting commission on that participation in that syndicate? A. I cannot answer this by yes or no, your Honor. It involves too much intricate finance to answer in that way.

Q. Well, you received that letter, didn't you Mr. Mitchell? A. Yes, I received this letter.

Q. And similarly with regard to the syndicate, so-called regarding Famous Players-Lasky. I show you this letter from Kuhn-Loeb & Company, dated August 27, 1925, and will ask you if you received that? A. Yes, but if I may interpose, these letters in which the final settlement is made are not letters that could possibly indicate the liability of the participants in entering the syndicate.

The MEMBER (Judge ADAMS). This answer thus far of the witness will be stricken from the record.

(Respondent's Exhibits AAAA and BBBB offered and received in evidence.)

By Mr. GREENBAUM:

Q. Mr. Mitchell, during these years referred to in that paragraph 33, that is the years 1918 to 1929, inclusive, was Mrs. Mitchell in a lower income tax bracket than you were? A. I assumed so.

Q. On the question of the sale to Mrs. Mitchell, one or two more questions, if you do not mind. I think you recall that yesterday you testified about the conversation you had with Mr. Forbes on the 20th of December. Now, have you told us the full statement of what occurred there, as near as you can recollect? A. Well, I thought I had at the time of my testimony.

Q. There is just one point I would like to ask you about. Didn't Mr. Forbes tell you that you should report this transaction to J. P. Morgan & Company? A. Yes, but after he found that the stock was in the name of Taff & Company, my recollection is that he withdrew that suggestion.

Q. Don't you know that Mr. Forbes left you under the impression that you would do that, that is notify Morgan & Company? A. If he did, it was not in my consciousness at the time.

Q. Didn't you consider that an important thing for you to do? A. Absolutely unnecessary.

Q. Did you ever tell J. P. Morgan & Company that Mrs. Mitchell owed you money for that stock before 1931? A. Apparently not.

Q. Did you ever advise J. P. Morgan & Company—or did you ever consider your claim against Mrs. Mitchell was an asset of your's—did you ever consider that as an asset? A. Yes, sir.

Q. And, therefore, didn't it occur to you that it was proper for you to notify J. P. Morgan & Company, to whom you owed a great deal of money? A. No.

Q. And you did not do that? A. Not at that time, no, sir.

Q. Did you ever give them a statement, written or oral, of your assets and liabilities? A. Not until comparatively recently, within the last year.

Q. That means after the repurchase from Mrs. Mitchell? A. Yes.

Q. Do you recall if there was included in that statement an item of liability of $666,666.67 to the National City Company? A. There was not.

Q. And didn't you consider that as a liability? A. A liability payable only out of the future accruals in the management fund.

Q. This morning you testified in regard to the claim, or statement of your position against the National City Company in regard to taking over the stock from Morgan & Company. You know the transaction I am referring to? A. I do.

Q. After you said I believe that you presented that matter to a meeting of the board, and you were only there for five minutes? A. To a meeting of the committee.

Q. But, regardless of that, Mr. Mitchell, I do not think you meant to imply that you did not have numerous other conversations with these gentlemen, individually or collectively on that subject? A. I think I said that was the only meeting I had with that committee. I had talked with individuals thereafter, but never in a group.

Q. How about before? A. I had talked with the individuals, but never in a group.

Q. That is what I am getting at, that that had been the subject of conversation and discussion between you and the individual members of the board; isn't that true? A. Yes, sir.

Q. You made the statement that on June 30, 1931, the board of directors acted on that, as appears in the minutes; is that correct? A. I do not get the question.

Q. My recollection is that you made the statement this
388 morning that on the 29th day of June 1931, the board of directors of the National City Company met and acted on that claim. Is that correct; do you recall so stating? A. June 29, 1931?

Q. 1932—that was the approximate date you wrote the letter withdrawing this claim? A. My letter was presented to the board, and became a part of the minutes.

Mr. GREENBAUM. May I ask that those minutes be produced.

By Mr. GREENBAUM:

Q. In the meantime, we will go along to save time. Did you state to that committee that Mrs. Mitchell owned that stock? A. I made no such statement to the committee of my assets and liabilities.

Q. No, I do not make myself clear. I am talking about the ownership of that stock. You stated to the committee that Mrs. Mitchell owned the stock; did you? A. I do not think I made any such statement.

Q. That was not mentioned, of course, in your letter which was submitted to the board? A. You mean my letter submitting the letter of counsel?

Q. Either in that letter, or the letter of counsel, was the fact that Mrs. Mitchell had purchased the 18,300 shares mentioned? A. The facts were definitely known to counsel, and to certain of the people considering this, and that was known to counsel of the National City Bank who met with this committee, where the discussions were held.

Mr. GREENBAUM. I move that the answer be stricken out.

389 The MEMBER (Judge ADAMS). The statements were contained in the letters, and the letters are the best evidence of that fact. The answer of the witness will be stricken.

Mr. WALLACE. I object to the question as incompetent.

Mr. GREENBAUM. I withdraw the question.

The MEMBER (Judge ADAMS). The question was objected to and the objection will be sustained.

By Mr. GREENBAUM:

Q. I will ask you whether you told any of the members of that committee that that stock had been sold to Mrs. Mitchell? A. I do not recall.

Q. Did you tell Mr. Carlysle? A. Mr. Carlysle was a member of the committee, and I say that I do not recall.

Q. And that is true, I take it, of all the other members of that committee? Mr. Forbes, and the other gentlemen? A. My recollection does not serve me sufficiently to answer your question yes or no.

Q. But you have no recollection of having told anybody? A. Anybody?

Q. Any member of the committee I should have stated? A. My recollection does not serve me.

Q. Who was making this claim, you or Mrs. Mitchell? A. I was presenting an opinion of counsel with respect to the claim. I was asking the board, or the committee for consideration.

390 Q. Was it your opinion in March 1932, that Mrs. Mitchell had a claim against the National City Company.? A. No.

Q. I show you this letter, that is the so-called letter of repurchase referred to as Exhibit Z, the letter of March 24, 1932, and will ask you if you did not buy Mrs. Mitchell's claim as well as the stock, according to the terms of that letter? A. This mention of a claim in this letter from me to Mrs. Mitchell, was placed in there by counsel, and my understanding of it was that they inserted that statement or claim so that if by any legal process the claim followed the stock, then that would be protection to me. It meant simply that; and it was inserted by my counsel.

Q. Had that stock been sold to a stranger, instead of Mrs. Mitchell, would you, or did you consider you would have a claim against the National City Company?

(Objection by petitioner's counsel sustained and exception granted.)

By Mr. GREENBAUM:

Q. What was the nature of this so-called claim being presented? A. Of my claim?

Q. Yes—I am not using the "so-called" in a derogatory sense. I think you are the one who called it "so-called"? A. The only claim I made to this group, or to any member of it at any time, was for consideration of all of the circumstances to determine whether or not I was entitled to consideration in view of the manner in which that block of stock was purchased.

Q. That is, then, you wished the company to consider whether it was proper for them or it to take the action suggested by counsel for you, is that correct? A. I did not go that far, Mr.
391 Greenbaum. My own feeling was that I was asking merely for consideration. I handed it to them as indicating the view of counsel, what the counsel said with regard to the claim itself.

Q. Well, were or rather weren't you saying or asking them in effect to consider the fairness or equity of the proposition or claim, or whatever words you want to use, for them to take over these 18,300 shares of stock and pay Morgan the indebtedness, wasn't that a fact? A. My only claim was a claim for consideration, and I handed it to them as an opinion of counsel which had been given to me with respect to that claim.

Q. Would you look at that letter you have before you, Mr. Mitchell, Exhibit Z, I believe it is, and tell me where that figure of $3,392,862 comes from, if you know. A. That was the price of stock at $212 a share. Whether there was in that an adjustment for interest and dividends, I cannot say.

Q. I recall the price of the stock was $3,860,000, and not $3,392,000, isn't that so? A. I would say there was some difference there. I would take your statement of the case.

Q. You do not know what that figure was? A. As I tell you, it was the price of the stock at 212 with some adjustment which I cannot state accurately the nature of right now having to do with dividends and interest.

Q. Wouldn't it come out about like this, Mr. Mitchell. This letter was dated March 24, 1932. You remember receiving an interest payment after January 1, 1932, on this from Mrs. Mitchell, didn't you?

A. I think not.

392 Then, it could be explained by that approximate amount of $40,000 being interest from Mrs. Mitchell to you which should have been payable on March 24th? A. Yes; maybe there was some adjustment or dividends, I do not know that, Mr. Greenbaum.

Q. That in effect was giving the items on interest as well as principal, was it not? A. Well, I assume it was taking the net debt at that time with the forgiveness of it, I assume.

Q. Do you know who received the dividends on this 18,300 shares on April 1, 1932? A. No; I do not without reference to the record.

Q. I show you this paper, and I will ask you if that refreshes your recollection that you got that dividend, and not Mrs. Mitchell?

Mr. WALLACE. This is April 1, 1932?

Mr. GREENBAUM. April 1, 1932.

A. Yes; that is so. Doubtless there was some dividend and interest adjustment in this figure which made it proper for me to receive this dividend.

Q. You say "doubtless." What was the amount of the quarterly interest on that—it was $49,000, wasn't it? A. I do not know what it was at that particular time.

Q. Mr. Mitchell, was that stock ex-dividend on March 24th? A. It must have been ex- somewhere around that time, but I cannot tell you the exact date.

Q. The dividend date did not change between 1929 and 1930? A. No; I did not.

Q. It is in the stipulation that it was about three weeks before the lividend date this National City Stock was ex-dividend, isn't

393 it a fact, and if you want to check that further, I refer you to the stipulation. I want to know if that stock was ex-dividend on March 24, 1932? A. Undoubtedly.

Q. That means that the dividend on that stock should have gone to Mrs. Mitchell, and not to you, isn't that correct? A. Not necessarily at all, because in this figure you have here I should imagine there was some adjustment for dividend and interest, but I haven't that computation.

(Respondent's Exhibit CCCC offered and received in evidence.)

By Mr. GREENBAUM:

Q. Will you be good enough to look at paragraph 36 of the stipulation, and—I am sorry, it is paragraph 31. That gives the amount of interest payment, so-called, which Mrs. Mitchell gave to you, and you will note that the amount was approximately $49,000 and some odd a quarter, wasn't it—it is a tabulation of figures there? A. Yes.

Q. And there was no interest paid on January 2, 1932, you will note? A. No, except it was considered in that price.

Q. Now, I am asking you if the price mentioned in that letter is not the purchase price so-called $3,800,000 plus interest with no consideration for the dividend? A. I cannot say without a computation.

Q. You know the purchase price of the stock was $3,879,600, do you not? A. Well, I do not carry the exact figure in my mind.

394 Q. I know you do not. Now, if you will look at the stipulation, paragraph 25, you will see the figure where the cost is given with the figure $879,600, and the figure should be $3,879,600. What I am getting at is, can you tell me whether or not the dividend payment on that stock which became due April 1 went to Mrs. Mitchell or to you? A. It is obvious that the dividend payment went to me, but whether there was any adjustment, and as of what rate of interest and dividends, I cannot say.

Q. And are you able to state now from the two figures that have been given you? A. I am unable to state. This figure was the figure that was suggested by counsel, and became the figure of the repurchase.

Q. Now, when you made that sale to Mrs. Mitchell, did you consider what would happen if the value of the stock went down? A. I do not think that I considered what would happen if it went to nothing. If it went to a few points, it would not matter.

Q. Didn't you consider under the circumstance or say to her—you considered practically a one way street along which you were going or words to that effect. A. I think that I told her, I know I told her in my opinion that stock would advance. Your Honor, I do not like to make a long answer, and it is most difficult for me to answer questions of that sort.

The MEMBER (Judge ADAMS). He asked you under the circumstances if you did not say to Mrs. Mitchell it was a "one way street" transaction.

The WITNESS. No, sir.

395 Teh MEMBER (Judge ADAMS). That answers the question.

By Mr. GREENBAUM:

Q. Did you say that to Mr. Forbes or anyone else? A. No, sir, not so far as I knew that it was a one way street. I do not remember saying that.

Q. Did you maintain the position at all times that Mrs. Mitchell was actually the owner of that stock after the 20th day of December 1929? A. As far as I know, I certainly did.

Q. Did you ever make any statement at any time or place in which you said you had not sold National City stock after December 1929? A. I could not have said that with respect to this block of 28,300 shares. That is perfectly obvious. I bought 28,300 shares, and I had sold 10,000 of that within three or four days.

Q. But, the question is did you make that statement shortly after December 20, 1929, that you had not sold National City stock? A. I never made any statement that I had sold any of my holdings of the stock that I had held prior to the panic, no, sir; that I always said I had never sold any of that stock. I also told that during the panic of 1929 I had bought extensively.

Q. Now, I will ask you specifically, Mr. Mitchell, whether or not you made a statement at a meeting of the stockholders of the National City Bank held in New York in January 1930, that you had not sold any of your National City stock, and—did you or not make such a statement? A. I did not make any such statement without qualifications.

396 Q. Well, what did you say? A. It is very difficult for me to say at this time the exact words that I may have answered on any inquiry, but in sum and substance I always assured——

The MEMBER (Judge ADAMS). Just a moment. I understand that counsel for the respondent is laying a predicate here, by seeking first to refresh the witness' recollection of that, to lay a predicate.

Mr. GREENBAUM. Yes, on this particular occasion.

The MEMBER (Judge ADAMS). You have stated the time and place and in effect the persons present, and you have asked him if he made a certain statement. Those are requisites to the proper predicate for that purpose. The answer to that should be yes or no.

Now, did you make that statement or not at the place, and under the circumstances inquired about, and did you say at the meeting of the directors of the National City Company, or the stockholders of the National City Bank of New York in January 1930, that you had not sold any of your stock in the National City Bank—did you make that statement or not?

The WITNESS. I certainly did not without qualifications.

The MEMBER (Judge ADAMS). Did you make it even with or without qualifications; did you state that or did you not state that?

The WITNESS. The question is with or without qualifications?

397 The MEMBER (Judge ADAMS). Did you make it either with or without qualifications?

The WITNESS. I think I may have very easily made a statement with respect to my own——

The MEMBER (Judge ADAMS). The question is did you make such a statement. The rule requires this kind of a question shall be specific in its nature, stating the time and place and the circumstances and person present, as near as possible, and the answer to the question is either yes or no.

The WITNESS. May I have the question?

The MEMBER (Judge ADAMS). You can answer it yes or no. Say you cannot answer it, or say you decline to answer it.

The WITNESS. May I have the question?

The MEMBER (Judge ADAMS). Ask him the question.

Q. The question is, did you state at a meeting of the stockholders of the National City Bank held in New York in January 1930 that you had sold none of your stock of the National City Bank? A. Not without qualifications.

Q. Did you make that statement either with or without qualifications? A. I may have.

Q. Was it your recollection that you did, Mr. Mitchell, make it with qualifications? A. I have a vague recollection that some question was asked me at the meeting, and I think very likely that it occurred at that meeting.

Q. What is your recollection as to what you did say? A.
398 My recollection would be of the stock that I had long held—I had sold no stock immediately before or since the panic—and that I had been a large buyer of stock during the panic.

Q. Did you by words or substance state that you had kept the stock; that you had been a large buyer—do you understand the question? A. No, and I certainly would not have made that statement.

The MEMBER (Judge ADAMS). The answer will be stricken from the record. We have got to confine ourselves to the proper answers to the questions.

The WITNESS. The answer is no.

By Mr. GREENBAUM:

Q. Were you asked the question whether you had sold stock—do you remember that, Mr. Mitchell? A. Hardly that. I have a general recollection that some question of that sort was asked me either in the shareholder's meeting or by some shareholder subsequently, and if I were asked the question in the shareholders' meeting, I would not deny it.

Q. Isn't it a fact that you stated that you had not sold a single share of your National City Bank stock? A. Not without qualifications.

Q. And the qualifications were what? A. That the stock I had had for a long period indicating my investment holdings, I had not sold this stock.

Q. Did you say that you had sold the stock you had acquired around the time of the panic? A. I did not. I said that I had been a substantial buyer of stock during the panic.

399 Q. Did you say whether or not you still held that stock? A. I did not.

Q. You did not say that you did hold that stock that time, the recently acquired stock? A. No, sir.

Q. And did you make the statement you had not sold any recently acquired stock? A. I do not think that question came into the meeting.

Q. Now, you were chairman of the National City Company, and your position before that, was that of president, wasn't it, Mr. Mitchell? A. Yes, sir.

Q. You were the chief executive officer? A. That is correct.

Q. You were chairman of all three institutions, the National City Bank, the National City Company, and the City Bank Farmers Trust Company? A. That is correct.

Q. And the other gentlemen of the National City Company were also directors or officers of the other companies? A. I think most of them were.

Q. And some of the men you mentioned this morning had varied and other important duties and interests, I believe, isn't that correct? A. Yes.

Q. And that is true in the main of all of the general managers of the National City Company except those who were officers under you, isn't that correct? A. Yes.

Q. Now, wasn't the action of the National City Company taken at the meeting of December 30, 1929, taken pursuant to your recommendation? A. It was taken only after full consideration by them, by that board of all affairs at the meeting, and the board was not constrained——

400 The MEMBER (Judge ADAMS). Just a moment please, he asked if the action taken by the board on that occasion was taken pursuant to your suggestion. You can answer that yes or no.

The WITNESS. I do not know how I can answer it without indicating the mind of each member of that board.

The MEMBER (Judge ADAMS). Then, you can answer it by saying that you do not know.

The WITNESS. Then, I will so answer, I do not know.

By Mr. GREENBAUM:

Q. You had made the recommendation that they should act as they subsequently did act, did you not? A. That was my view of it.

Q. That was your recommendation, Mr. Mitchell, that is what I am getting at? A. I was really a party in interest, and in that particular matter I was hardly in a position to argue strongly a recommendation.

Q. I am not asking you about your agrument, or persuasiveness in connection with it, but I am asking you if you did not actually recommend it? A. I think I certainly went so far as to express a view that it seemed to me the most desirable way to act.

Q. Can't you say definitely, Mr. Mitchell, whether or not you did recommend it affirmatively to the board, that is the only thing I am interested in knowing? A. I could not say I could go that far.

401 Q. Do you say you did or did not recommend it? A. I say that I expressed to the board my own personal view that that was desirable course to pursue. Whether or not that can be construed as a recommendation, I do not know.

Q. And the action was taken in regard to the management fund. It is a fact, isn't it, that your salary was increased in 1931? A. Something over a year later.

Q. It is a fact that you received $50,000 from the management fund in 1931, that had been in the fund prior to January 1, 1929? A. That is true.

Q. It is a fact, also, that you received $383,000 from the National City Bank management fund in 1930, I believe? A. Well, I do not recall the figure, but I received a sum, and I am ready to accept your figure.

Q. Isn't it also a fact that you never did repay or make repayment to the National City Company in connection with this item of $666,000? A. That is a fact; yes, sir.

Q. And was any effort made to collect any of that from you, or any of the other recipients of that fund? A. No, sir.

Q. Now, in regard to your recollection as to your recommendation for the action to the board, which action the board took, I refer to page 1785 of the hearings before the Subcommittee of the Senate on Banking and Currency, and I will ask you whether you recall making this statement:

"When the year ended, there being nothing in that management fund, it seemed wise to me, and I recommended it to the directors at the time the recipients should be willing to consider that

402 only as an advance upon the future accumulations of the management fund, and it was so arranged."

Do you remember making that statement? A. I do not recall it, but I accept it as what I said.

Q. Now, you say that you did not recommend it? A. I repeat that I expressed to that group that this solution of the matter was a proper one and—

The MEMBER (Judge ADAMS). That answer will be stricken out. The question was, now, you say that you did not recommend it, and you can make a yes or no answer to that.

Mr. WALLACE. If your Honor please—

The MEMBER (Judge ADAMS). Do you say now that you do not know?

Mr. WALLACE. Your Honor means to be fair?

The MEMBER (Judge ADAMS). I want to be, if I know how.

Mr. WALLACE. The witness has said that he does not want to question whether what he did say amounted to a recommendation. He has stated exactly what he did say.

The MEMBER (Judge ADAMS). He has stated that on two occasions.

Mr. WALLACE. Yes.

The MEMBER (Judge ADAMS). I am not urging the repetition of that statement which has twice gone into the record, and I am going to keep it out of the record a third time.

403 Mr. WALLACE. With the utmost respect, I shall object to forcing the witness to characterize what he said he did say. I do not think that the witness should be required to draw a conclusion from what he said, that this was a recommendation.

The MEMBER (Judge ADAMS). I have no such purpose in mind, and I think that counsel for the respondent has no such purpose. I ask that you state the question over again.

By Mr. GREENBAUM:

Q. Mr. Mitchell, I just read this statement from page 1785 of the Subcommittee on Banking and Currency, and I now ask you whether or not you recommended such action to the directors in December 1929? A. I am not certain that what I said to them could be construed as a recommendation. I told them that in my opinion this was the proper action for them to take.

Q. And thereafter they took that action? A. After considering all of the facts, they acted in the way stated in the resolution.

Q. Who prepared the receipts for the management fund payment which were signed in or about December 1929? A. I only know from hearsay. They were prepared under the guidance of Mr. Byrnes, vice president, who, as I say, had several major problems at that particular time of the National City Company to settle, and under the guidance of Mr. H. F. Mayer, the controller of the National City Company, and in consultation with Mr. Forbes, a member of the firm of Shearman and Sterling.

404 Q. Did Mr. Forbes prepare those receipts before the directors had approved the action taken on December 30, 1929? A. The receipts were prepared prior to that time.

Q. Were they signed before the meeting of December 30, 1929? A. Some were, not all.

Q. Wasn't Mr. Baker's signed before that? A. I do not know, I am sure.

Q. By whose authority could receipts of that character have been prepared and signed prior to the board's action? A. My recollection is that the treasury department under the controller asked the officers to sign this form of receipt so that if the board were to act in accordance with that receipt, he would have on hand at the close of the year this evidence of debt by which he might enter into his books.

Q. Under whose instructions was that done? A. I do not know.

Q. Would anybody in the bank be authorized to take action like that without either your direct authority or that of the board? A. Yes, sir.

Q. On an action of that nature? A. Yes.

Q. Who else? A. Any man could take that action, Mr. Byrnes or Mr. Mayer had the matter in hand, and they were the ones that requested it.

Q. And they could prepare such a thing for your signature? A. It was signed by me subsequent to the board's meeting.

Q. And those are the gentlemen you say who could have prepared that prior to the board's meeting? A. I do.

Q. And do you now say you did not have to give instructions that those receipts should be prepared, and you were not informed
405 of any action taken before the board's meeting? A. I do.

Q. The whole idea, however, was in accordance with your thought as to what should be done in the situation in fairness to the parties, wasn't it? A. As it turned out.

The MEMBER (Judge ADAMS). Gentlemen, I think this a good place to stop. I want to ask one question. When you refer to the treasurer and the controller, you refer to the departments and the officers of the National City Bank?

The WITNESS. Of the National City Bank.

The MEMBER (Judge ADAMS). When you said the treasurer, you meant the treasurer of your company?

The WITNESS. Yes, sir.

The MEMBER (Judge ADAMS). And when you said the controller, you meant the controller of your company?

The WITNESS. Yes, sir.

The MEMBER (Judge ADAMS). I was trying to distinguish between your company and the United States Government.

By Mr. GREENBAUM:

Q. Mr. Mitchell, yesterday I asked you in regard to the use of the expression "one-way street" in your conversation with Mrs. Mitchell and you said you did not recall using that expression. I will read from this statement of March 16th, a report given by you to the United States Attorney's Office, and I will ask you if this will refresh your recollection:

406 "I told her that I had to sell this stock, that I felt that it was a one-way street for profits and that I had the stock in the Morgan loan; that I was comfortable with it and that I knew the Morgan people would be glad to carry my loan without any question."

I ask you if that refreshes your recollection? A. I think undoubtedly I made that statement.

Q. Is it not a fact that, going back to your office, the morning of that date, you were very optimistic? A. I was very optimistic.

Q. And you did not consider the question of loss on that, or discuss it with Mrs. Mitchell? A. I did not.

Q. The following day you had a conversation with Mr. Forbes. I ask you what advice Mr. Forbes gave you as to the legal papers that would be necessary to carry out this transaction? A. I think I could best answer it in this way; I started with the idea of dictating some very formal papers and then Mr. Forbes and I made the suggestion that I had always dealt with Mrs. Mitchell by let-

ter and Mr. Forbes said that that was a satisfactory way to do it and those papers were dictated, with some corrections, as I dictated from time to time, as I recall it, by Mr. Forbes, when the draft was brought in and Mr. Forbes himself made corrections of the papers, and then they were rewritten.

Q. As a matter of fact, it was rather a simple transaction as far as the legal phase of it was concerned, was it not? A. I do not pretend to know the legal phase of it.

407 Q. Were there any complicated parts of it at all? A. Not as far as I was concerned.

Q. Do you remember using this expression in describing your transaction, referring to your transaction with Mr. Forbes:

"I discussed this matter with him fully and told him what I would like to do. He considered the matter, suggested the possibility of doing it one way or another in what seemed to me to be more or less camouflage of operation of my unlearned mind in such matters."

Do you remember making that statement? A. Well, I do not, and I don't know now what it means. This was a time when I was called in, very fresh in this matter and had had no time to think about it, and I really do not know just what I meant by those words.

Q. Did Mr. Forbes say anything that would more or less camouflage the operation of your mind in that record? A. No; and I don't know now what that means. Mr. Forbes very definitely knew the operation of my mind. That is, I assume that he did, because the statements were very clear, and out of that these papers were drawn.

Q. You are not denying that you made this statement, are you? A. If it is in the record, I am bound to assume that I did.

Q. Mr. Mitchell, you said yesterday that, in your conversation with Mr. Cary and Mr. Sweeney, the expression was used of "forgiving indebtedness." Do you remember that? A. It was new to me and "forgiveness of debt" to me, as a banker, is quite an unusual term.

408 Q. You mean just the use of the words "forgiveness of debt"; you mean the whole idea of forgiving it; is that it? A. No, I mean the words "forgiveness of debt" are quite strange to me.

Q. Is there anything unusual for bankers to forgive the payment of a debt, that is, no longer to require the payment of a debt if it is not owing? A. Usually I would say what might come under that category is some composition of debt.

Q. But how about forgiving it; is that unusual? A. Yes, I would certainly say so, provided there was any means of recovery.

Q. I will ask you exactly what the National City Company did in connection with Mr. Olwell's debt to the Management Fund Repayment? A. I think that Mr. Olwell's settlement, Mr. Greenbaum, was a composition of debt.

Q. As I understand it, he owed a certain amount for a long advance and in addition to that he owed for the overpayment of the Management Fund and then there was an arrangement extending him time to operate or borrow money to three years—is that right? A. I must give you the operation of my own mind, whether it was

correct or not. The advice that had come to the various men who had received this mid-year payment, was given, I think, in 1931 by counsel that if a man receiving that sum left the employ of the institution, that that sum received in 1929 must be declared in the year in which the severance of his employment with the institution took place. This case of Mr. Olwell's therefore is in point. Mr. Olwell had left the institution and the operation of my own mind was
400 that the amount he received in 1929 was an amount that he would enter as income in the year in which he left the institution. The balance of the debt, then, to the company was considered and composed on a basis where it was believed Mr. Olwell would be able to pay. Otherwise, Mr. Olwell would have had to probably go through bankruptcy.

Q. That is insofar as the balance of the debt, that is, the borrowed money, was concerned, but is it not a fact that in accordance with the operation the Management part of the fund was, in effect, forgiven? A. I do not pretend to pass on the lack of legality of this, or whether it was forgiveness, or not, but I will say that since that time we have heard a lot about forgiveness of debt. But at that particular time that was quite a new expression to me.

Q. However, that may be, the fact remains that, in your mind, the Management part of the obligation was to be treated differently than the loan which Mr. Olwell had gotten from the bank; isn't that so? A. That was the operation of my own mind regarding it.

Q. Now, in regard to this so-called Sweeney memorandum, the second one, in August, August 11, 1932, Exhibit W, you recall that on the bottom of that there is a statement in regard to insurance premiums? A. I remember that there were two or three items on that; yes.

Q. Those were premiums due on policies upon your life; isn't that so? A. That is true.

Q. And hadn't it been your custom to reimburse insofar as you were able Mrs. Mitchell for the premium that she had paid on those policies? A. One way or another I tried to keep any burden
410 that fell on Mrs. Mitchell by virtue of anything having to do with me personally, away from her.

Q. I am showing you some papers, Mr. Mitchell, and ask you if on that page that you are looking at now, if the writing is in your handwriting on the typewritten sheet? A. I should say it was; yes.

Q. And on the next sheet, the third sheet, is that in your handwriting? A. Do you mind if I look at this?

Q. Very well—take your time. A. May I ask: Is this an exhibit or——

Q. The exhibit is not in evidence, Mr. Mitchell.

(The witness identified the portion of the exhibit in longhand as being in his handwriting and the document was received in evidence as Exhibit DDDD.)

By Mr. GREENBAUM:

Q. This paper that I have shown you is a draft of proposed minutes of the meeting of the Board on December 30, 1929; is that correct? A. I think the first part is. Whether the last part is——

Mr. WALLACE. No; the other is January 8th.

By Mr. GREENBAUM:

Q. Yes—also part of the minutes of January 8th, 1930; isn't that right? A. Yes; a minute for proposal at the next meeting, if I recall.

Q. Yes.

Mr. GREENBAUM. For the clarity of the record, I will say that the minutes of the meeting of December 30, 1929, are in evidence as Exhibit PP.

411 By Mr. GREENBAUM:

Q. I ask you, Mr. Mitchell, whether, after looking at that paper, you can say whether you did not go over the minutes and make suggestions as to the form which they should finally take? A. You mean as a general practice?

Q. No, specifically as to the Management Fund in 1929? A. I cannot make a general statement. This draft was prepared by Mr. Winston, counsel for the company, and a director, and the resolution had been passed at the December 30th meeting, which Mr. Winston was asked to put into formal shape, and he drafted that, and with that, certain resolutions for the next meeting, and my recollection is that he sent them to me to look at, to see if I had any suggestion coming from my recollection or information and those penciled interpolations there in the draft are mine, and that was sent back to Mr. Winston.

By Mr. GREENBAUM:

Q. Mr. Mitchell, thereafter wasn't it the general program of the National City Company to ease the situation insofar as possible for the Executive Officers who were no longer receiving the Management Fund compensation? A. I don't think I get the purport of your question.

Q. Maybe I better re-frame that. After January 1, 1930, were not actions taken from time to time by the Board for the purpose of easing the situation, that is, enabling the officers to get more money, in other form, than they had previously gotten from the Management Fund? A. I recall two acts specifically one, the payment
412 to officers of the balance of the 1928 Fund, and in the year 1931, if I recall, an increase in the salaries of the officers. Those are the only two.

Q. Yes, those were taken along the line indicated? A. Yes.

Q. Do you recall the action taken which permitted the Executive Officers to have a drawing account of one-half of their salary? A. Yes, there was action taken along that line.

Q. Do you happen to remember the date of that? A. I do not.

Q. I ask you if you will be good enough to look at this and tell me if that was the action taken, which you have just mentioned, that was taken on June 24, 1930? A. Yes, this is undoubtedly a copy of the minutes of that meeting of June 24th.

Mr. GREENBAUM. I won't offer that in evidence.

By Mr. GREENBAUM:

Q. Yesterday you testified about a conversation you had with a Revenue Agent in 1931 in regard to the 1929 return. I ask you: At any time during that conversation, was the Management Fund Payment of $666,000 mentioned? A. It was not.

Q. If you had sold the 18,300 shares of National City Bank on December 20, 1929, in the market, to a stranger, would you consider that you were in a position, in March 1932, to claim that the National City Company would take the 18,300 shares and pay the loss to you?

Mr. WALLACE. I object to that question as hypothetical, not
413 founded upon any actual situation and not calling for any testimony as to fact.

Mr. GREENBAUM. We are going into the question of the operation of the witness' mind, if the Court please, and the question here presented is if the act of the petitioner in presenting this claim, or whatever we wish to call it, to the National City Company, to take over this stuff, was consistent with the ownership of the stock in Mrs. Mitchell?

Mr. WALLACE. Counsel is putting the facts before him now.

The MEMBER (Judge ADAMS). I think that is asking him what his reaction to it would be now. What we are trying to determine is his intention then.

Objection sustained.

Mr. GREENBAUM. Exception.

(Portion of testimony relating to 1930 transactions not involved on this appeal omitted.)

Q. Did you take substantial tax losses in the year 1931—if you read this letter, Mr. Mitchell, it may refresh your recollection.

(Objection by petitioner's counsel sustained and exception granted.)

By Mr. GREENBAUM:

Q. Did you write that letter, Mr. Mitchell? A. That is a photostat copy of a letter which I undoubtedly wrote to Mr. Whitney.

(Respondent's Exhibit EEEE offered and received in evidence.)

414 Re-direct Examination by Mr. Wallace

Q. Mr. Mitchell, inquiry has been made into the value of certain personal property of Mrs. Mitchell, and it has been directed to jewelry, household furniture, and so forth. Have you in mind one item of jewelry, one only, that cost a very considerable sum of money, among the gifts that you made to Mrs. Mitchell? A. Yes.

Q. What was it, and what was the cost? A. I made a gift to Mrs. Mitchell of a pearl necklace at that time, costing, I think, $40,000.

Q. Have you in mind the insurance carried upon Mrs. Mitchell's jewelry? A. It is not carried now because the jewelry is all in the safe deposit vault, so as to avoid the expense of any insurance. The insurance carried was something around $85,000.

Q. Had there been an appraisal on the jewelry for the purpose of getting insurance? A. Yes.

Q. And you say that the appraisal was limited to something less than the value of the jewelry when an appraisal was made for insurance? A. I hardly think so. I think it is appraised at its value. As I remember, Mrs. Mitchell had Cartier—what they valued all the various items, it was insured for that total.

Q. Do you remember the amount of the insurance? A. As I said, something around $85,000.

Q. And the Cartier appraisal corresponded with the amount? A. Yes.

Q. Who was Cartier? A. A jeweler in New York

Q. I call your attention to Respondent's Exhibit YYY, which is a photostat of a return, headed "Assesments of Personal
415 Property, 1928," and which is attached to a letterhead entitled "City of New York, Department of Taxes and Assessments" and I call your attention particularly to the writing in the printed form of the photostat, and ask you whether that writing is your own—I am not speaking of the signature? A. No, sir.

Q. And I am speaking of the inserts opposite the printed headings and topics? A. No, sir.

Q. Is it or is it not? A. It is not; no, sir.

Q. Do you know whose it is?

Mr. GREENBAUM. There is no such contention; he has stated that that is not in Mr. Mitchell's handwriting.

By Mr. WALLACE:

Q. Now, will you tell the Board the circumstances under which, and why, you signed that particular assessment? A. My recollection of it is this: It is but a recollection of it, having to do with the personal property taxes in New York: There was an assessment here of $30,000 and I had a talk with the Deputy Commissioner of the Department. I made my home part of the time at Tuxedo, New York, and part of the time in New York City. A lot of the furniture and Mrs. Mitchell's personal things were at Tuxedo, for the most part Mrs. Mitchell and I also voted at Tuxedo, which apparently raised the question as to whether Mrs. Mitchell, whether her citizenship was there or in New York City. Furthermore, the question arose in that conversation about the personal effects. I told the Commissioner that there had never been any question between us as to who legally owned them. He asked me who had paid for them and who
416 was carrying the insurance on them and I told him that I was, and this rather brief discussion of the matter and the question of Mrs. Mitchell's residence resulted in his saying: "Well, we will

compromise by reducing this tax on Mrs. Mitchell to $5,000 for personal effects" and, as I recall it, the handwriting that was put in this sheet, which I never even bothered to read, was his, and I was asked to sign this, which I did. In New York City, when this personal tax was on—it has since been wiped out, if I remember correctly—there is a provision that any mortgage debt that the taxpayer had was a complete offset, to its full extent against any personal property. So that this personal property was considered as mine and was offset completely by this mortgage debt which I was carrying. I was carrying a mortgage of $200,000 on my home at that time, and that mortgage still exists, as a matter of record.

That is the explanation as it goes through my own mind with regard to this.

Mr. GREENBAUM. If the Court please, I move to strike out that part of the answer in reference to the mortgage explanation, on the ground that it was not responsive and is clearly irrelevant to the question involved. The petitioner has spoken about his mortgage obligation and whether or not that is offset is certainly no indication of Mrs. Mitchell's wealth.

The MEMBER (Judge ADAMS). Objection overruled.

Mr. GREENBAUM. Exception.

417 By Mr. WALLACE:

Q. Now, turning to the matter of the 18,300 shares, it appears that at the time of the sale of these shares to Mrs. Mitchell, Morgan & Company was not notified; will you tell the Board why no notice was given to Morgan & Company at that time? A. When Mr. Forbes was talking to me in my office he said: "You will have to notify J. P. Morgan & Company so that Mrs. Mitchell will receive these dividends." I said at that time: "This stock is not in the name of the Morgan firm or a nominee, but it is in the name of the nominee of the National City Company. Therefore, if I notify them of the transfer of the title to these shares, Mrs. Mitchell will receive the dividends from them, and it will be unnecessary to notify Morgan."

Well, he added this at some time in the conversation: "Well, I wonder if you should not notify Morgan so that Mrs. Mitchell can always have her shares available." And I said to Mr. Forbes: "Why, there certainly will be no difficulty on that score." And that, from my standpoint, wiped out the thought of notifying Morgan, and I said that for this reason: "If the collateral in that loan, National City Bank stock, advanced in price, obviously it would increase the margin so that Morgan would be perfectly willing to release any part of the $200 which was the agreement originally as to the collateral value against the loan. On the other hand, if the price went down below the $212, which was the sales price to Mrs. Mitchell, of course, then they would be perfectly willing to release any collateral at $212. I saw no difficulty at any time in getting that collateral out for Mrs. Mitchell and saw no reason for notifying J. P. Morgan & Company.

418 Furthermore, I regarded it the same as stock that one would buy through one's broker where the broker is carrying it. If any sale were made it would not be necessary in any event to notify the broker. I think that certainly—I thought at that time that I had satisfied, and I knew that I had satisfied my own mind and thought that I had satisfied Mr. Forbes' mind with regard to the necessity of notifying Morgan & Company.

Q. Regardless of whether or not Mr. Forbes was satisfied, you have detailed all that really happened? A. As nearly as I can remember it, yes.

Q. You started to explain what liability was incurred by the syndicate subscriber, or a participant. While it is not very material it was suggested that that was not responsive but that you could make an explanation on re-direct under questions of your own counsel. If you care to state your understanding of the liability of Mrs. Mitchell in these syndicate participations of hers, you may do so. A. I wish to make it clear that in all my experience, I think I have never seen a syndicate offering that did not definitely involve risk upon the syndicate participant. I have seen many in which it looked as though the profit was sure and could be——

The MEMBER (Judge ADAMS). (Interposing.) Do you think this is material?

Mr. WALLACE. I think it is not, sir, and I thought so at the time it was made.

The MEMBER (Judge ADAMS). He is relating now his experience with syndicates, and it seems to me we are encumbering the record with much that is immaterial. Proceed, however, and let us get through with it.

419 The WITNESS. I would only add this, your Honor: As an indication, I think you will find in Mrs. Mitchell's accounts, which are in the record and part of which is in the stipulation, if I am right, one syndicate operation in which there was a loss of fourteen or fifteen thousand dollars which Mrs. Mitchell paid, indicating merely that syndicate operations, like much else in life, are not one-way streets.

By Mr. WALLACE:

Q. I call your attention to the opening sentence of one of the letters employed in the repurchase of the 18,300 shares, in March 1932. It is Respondent's Exhibit Z, upon your letterhead and I invite your attention to the opening sentence: "Dear Elizabeth: You now hold 18,300 shares of capital stock of the National City Bank of New York, together with certain claims against the National City Company, in connection therewith."

While you signed that letter, who prepared it? A. It was prepared by counsel.

Q. What was your understanding at that time as to who had the claim, if any there was, against the National City Comapany, growing out of your action in coming to the relief of that company? A. I did.

Q. Did you consider that you had sold that claim, or any claim that you had against the National City Company at the time of the sale of those shares in December 1929? A. No.

Q. The question as to your statement of the stockholders' meeting of the National City Company in January 1930, I want to consider with you for a moment. Several questions were put
420 to you in which the statement attributed to you was expressed in various different ways. I would like to ask you whether the inquiry about selling shares was an unusual one or whether such inquiries were made of you somewhat frequently? A. I would say that generally they were unusual. They certainly were not frequent.

Q. And what have you to say as to whether the inquiries, when made, made such an impression upon you that you are able to recall what you did say about the matter? A. No.

Q. Had you ever, after July 1929, the middle of the year, sold a single share of the 35,000 shares owned by you as an investment? A. No, sir.

Q. What were the only shares sold by you between July and the period of this January 1930 stockholders' meeting? A. They were the first ten thousand shares sold out of the 28,300 share purchase, and then the 18,300 shares sold to Mrs. Mitchell.

Q. Making the entire amount of the shares purchased in your emergency relief efforts? A. Quite so.

Q. I will ask you whether there were in that stockholders' meeting men who knew of your acquisition of those 28,300 shares and men who knew of the sale of the 10,000 shares that had been made immediately thereafter? A. There were.

By Mr. MOORE:

Q. Mr. Mitchell, for how many years has the firm of Shearman & Sterling been the counsel for the National City Bank? A. For many decades.

Q. Their offices are located right in the bank building itself, are they not? A. Yes, sir.

421 Q. And they occupy the 8th and 9th floors of the building in which you had your own office? A. Yes.

Q. And during the period of time in which you had been the president of that institution, from 1921, had you made it your habit to confer with lawyers of that firm from time to time each day? A. Every day, I think, I spent a great deal of time with some one or another member of that firm.

Q. In particular was there any particular member that you saw more than anybody else? A. I would say Mr. Cary more than anybody else.

Q. After Mr. Winston left Washington and came to the firm, did you also talk to him? A. Oh, a great deal.

Q. And one of his particular duties as a senior partner was in connection with the firm of the National City Company? A. Yes.

Q. And Mr. Cary was more concerned with the affairs of the National City Bank? A. Yes.

Q. Had you known Mr. Harry W. Forbes for any considerable period of time? A. Yes; I had met him first in 1907.

Q. And had you known him ever since? A. Yes—not intimately, but I had known him. I picked him up again when I found him with Shearman & Sterling and I had, from time to time, meetings with him.

Q. In a business way had you been in the habit of conferring with him from time to time during the years 1921 to 1929 on tax matters? A. Yes.

Q. And did you know that he was the tax expert, so-called, in that firm? A. I did.

422 Q. A man who specialized in his legal practice in matters pertaining to tax law and tax problems? A. Yes, sir.

Q. I think it is a fair statement, isn't it, Mr. Mitchell, that you are not desirous of paying any more taxes each year than you have to? A. I think that may be said to be so.

Q. When you wrote this letter, Exhibit EEEE, to Mr. Whitney, you had that in mind? A. I did.

Q. Had you talked with Mr. Forbes at all about the matters referred to in that letter? A. I had.

Q. Can you state, to the best of your recollection, the substance of that conversation? A. It was more than a conversation. Mr. Forbes had prepared a memorandum which was quite generally circulated among the officials of the institution and which dealt with a subject which was being discussed a good deal among the people on the street. Without attempting to be legal in my statement of the matter at all, the effect of the memorandum, the subject of my conversation with Mr. Forbes was this: That under the rules or regulations it was believed that if a security which was running out of its two-year holding life, after purchase, was sold and repurchased within a period of thirty days thereafter, the cost of the security as repurchased would carry the original cost, and that would be the cost for the two years following. In other words, the original cost of the security could thus be kept alive and it was becoming quite common practice for men to sell their two-year security and repurchase them within thirty days and thus obtain the advantage of another two years' life of the original cost price.

423 Q. And that was a practice that was in full compliance with the tax law as it stood and as you then understood it? A. Yes.

Q. Was that ever the subject of a written memorandum by Mr. Forbes? A. Yes; it was.

Q. I show you a paper headed "Losses for Federal Income Taxes," and ask you if that is the memorandum to which you are referring? A. This is the memorandum; yes.

(Petitioner's Exhibit 55 offered and received in evidence.)

By Mr. Moore:

Q. After you had talked to Mr. Forbes and had been shown this memorandum which has been marked Petitioner's Exhibit No. 55,

you wrote the letter Exhibit EEEE? A. I wrote the letter to Mr. Whitney, marked Exhibit EEEE.

Q. You were asked yesterday, Mr. Mitchell, about the size of your income in years previous to 1929. Have you, since yesterday, been able to find any papers upon which that income was recorded more exactly than your memory gave us yesterday? A. I have not seen the papers. I suggested that we try to get the income tax papers which would show the revenue.

Q. I show you an income tax return for the year 1924 and ask you if that net income of $482,238.58 represents income reported for that year? A. Apparently.

Q. And was that your net income for the year 1924? A. Apparently.

Q. On the bottom of this return, is that figure of $191,020.74 total tax; did you pay an income tax in that amount in the year 1924? A. I did.

Q. I show you a similar paper entitled "Income Tax Re-
424 turn for the Calendar Year 1925" and ask you if that income of $988,686.54 represents your net income, and if the tax of $417,300.21 was paid in that year? A. This is the statement prepared by Mr. Black and I am relying on these figures as being correct.

Q. This is copy of the paper that you signed prepared by Mr. Black and which was forwarded to the appropriate department? A. Yes.

Q. I show you a similar paper headed "Income Tax Return for the Calendar Year 1926" showing a net income of $891,485.78, with the corresponding tax of $280,197.40; is that correct? A. That is correct.

Q. I show you a similar paper entitled "Income Tax Return for the Calendar Year 1927," showing a net income of $965,584.84, with the corresponding tax of $226,196.00, and ask you if that is correct? A. That is correct.

Q. And a similar paper for the calendar year 1928, showing a total net income of $1,438,613.99, with a tax of $342,371.59, and ask you if that is correct? A. That appears to be correct.

Q. In connection with the preparation of resolution and the minutes of Directors' meetings, it was rather customary, was it not, for the resolutions and minutes to be prepared after the meeting had taken place? A. That very often occurred, yes.

Q. The reason for that was that you were not altogether certain as to the action that would be taken at the meetings and therefore it would be necessary to draw resolutions to correspond to what had taken place at the meetings? A. Very often a question would
425 arise totally uncontemplated at the meeting and action would be taken on it rather than to wait there and draft a resolution in writing. That resolution was passed informally, and, as a rule, counsel were asked to draft the resolution in a formal way for approval at the next meeting.

Q. And after counsel had drafted it, it was customary, was it not, to submit a draft of such minutes to you to see whether they corresponded to your recollection of what had occurred at such meeting? A. I think that could be said truthfully.

Q. And such changes could be made in the draft as corresponded with your recollection of what had occurred? A. Yes.

Q. And that was the situation in connection with Exhibit marked Respondent's Exhibit DDDD, which I show you? A. It was.

Q. You will note on the third page of these minutes a pencil interlineation as to officers receiving advance money, Management Fund, in July 1929? A. I do.

Q. Is it not a fact that that interlineation was inserted in order that the proportion of the Management Fund which was to be received in future years should be exactly the same as that which they were entitled to receive as of July 1929, so that the percentages could go forward on the same basis and the repayment be made in the same proportion? A. Yes. My interlineation here, I think, hardly adds to Mr. Winston's resolution. It perhaps makes it clearer; that is all. There is no addition or subtraction from the meaning to Mr. Winston's writing.

Q. Go back for just a minute to the talk that you had with Mr. Forbes on December 19th. As I understand it, Mr. Forbes came to your office and you discussed the situation for sometime. I
426 do not think you have told us yet about how long that conference took? A. Oh, I should say that Mr. Forbes was with me for well over half an hour. I do not know whether it was half an hour or three-quarters, but it was not just a brief interview by any means.

Q. After you had told him the facts which you have already spread upon the record, is it not a fact that Mr. Forbes discussed with you various methods and ways and means of carrying out a sale before you decided upon the method finally adopted? A. Mr. Forbes asked about selling this stock in the open market, if I recall rightly, and I told him as I have told here on the witness stand, my reaction to that. He asked me, I think, why Mrs. Mitchell did not buy this and have the loan created for her, that is, with Morgan or elsewhere, why she did not borrow; and I told him that the loan was being carried with ease and that I should be willing to carry the stock for her as it was carried.

By Mr. MOORE:

Q. It is a fair statement, isn't it, Mr. Mitchell, that you and I have not talked about camouflaging for at least over a year? A. I do not ever remember discussing it with you.

Q. I will read again a portion of the statement from which Mr. Greenbaum read:

"The following day, on December 20, I asked Mr. Forbes, a partner of Shearman & Sterling, who had to do with tax matters, to come to my office. I discussed this matter with the petitioner
427 and told him what I would like to do. He considered the

matter, suggested the possibility of doing it one way or another in what seemed to me to be more or less camouflaging the operation of my unlearned mind in such matters."

Do you remember that expression any better now than you did when it was first read? A. Yes, I do.

Q. And I think it is quite apparent that I have not talked with you about camouflaging since Mr. Greenbaum read that statement?

The MEMBER (Judge ADAMS). I think that is not the matter at issue here now.

Mr. MOORE. I will withdraw that.

By Mr. MOORE:

Q. Will you just tell me whether your memory is refreshed by what I have read? A. It is.

Q. Will you tell us the situation? A. I recall that after Mr. Forbes had suggested other methods for carrying this stock or for handling the sale, I said. "If the sale is proper, as I view it, why camouflage it? If it is proper for me to carry the stock for Mrs. Mitchell, why camouflage it." That is to the best of my knowledge and belief the particular situation in which this occurred.

Mr. MOORE. No further questions.

The MEMBER (Judge ADAMS). Is there any further cross-examination?

Re-cross examination by Mr. GREENBAUM:

Q. I would like, Mr. Mitchell, if you have it in Court, your 1931 income tax return, or a copy thereof. A. I cannot answer that.

428 (Testimony relating to 1930 transactions not involved on this appeal omitted.)

The MEMBER (Judge ADAMS). There is one other matter: Mr. Forbes, as I understand, was a practising lawyer connected with the firm of Shearman & Sterling?

The WITNESS. Yes, sir.

The MEMBER (Judge ADAMS). They were general counsel for the——

The WITNESS (interposing). For the National City Bank and the National City Company.

The MEMBER (Judge ADAMS). For the National City Company as well?

The WITNESS. Yes, sir.

The MEMBER (Judge ADAMS). Had you ever discussed this matter with him or any one of that firm before the time when he came into your office there?

The WITNESS. No, sir.

The MEMBER (Judge ADAMS). Did Mr. Forbes give you a written opinion about the matter?

The WITNESS. No, sir.

The MEMBER (Judge ADAMS). You had a discussion with Mr. Carey—he was an attorney?

The WITNESS. Yes, sir; one of the senior partners of Shearman & Sterling.

The MEMBER (Judge ADAMS). Did he give you a written opinion about the matter you consulted with him about?

The WITNESS. No, sir. As a matter of fact, your Honor, even in matters of the greatest importance with respect to the
429 institution itself, it was not customary for that firm to give written opinions.

The MEMBER (Judge ADAMS). You spoke of this mortgage lien on your home; do you recall, Mr. Mitchell, whether in that mortgage for $200,000 these items of jewelry, pieces of art, and furniture, were specifically included in that mortgage?

The WITNESS. Oh, no; that was a real estate mortgage entirely.

The MEMBER (Judge ADAMS). I wanted to clarify that. That is all.

Are there any further questions?

(No response.)

The MEMBER (Judge ADAMS). You are excused.

(Witness excused.)

Whereupon Mrs. CHARLES E. MITCHELL (ELIZABETH REND MITCHELL) was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. MOORE:

Q. Mrs. Mitchell, how long have you and Mr. Mitchell been married? A. We have been married 26 years, this coming June, the third of June.

Q. You met Mr. Mitchell in Chicago where he was working back in 1904 or 1905 or 1906, did you not? A. Yes; earlier than that.

430 Q. How many children have you? A. I have two children, a daughter and a son.

Q. How old is your daughter? A. She will be 20 years old this month.

Q. And your son? A. Seventeen.

Q. You had always lived in Chicago, had you not, prior to the time you married and moved away? A. Always.

Q. Your parents were persons of substantial means, were they? A. They had independent means; yes.

Q. Did you have any brothers and sisters? A. I do, three brothers and one sister.

Q. And amongst your brothers there is one Joseph? A. Yes.

Q. One James? A. Yes.

Q. Do you recall approximately when your parents died? A. My father died in 1915. A younger brother of mine, that I did not mention, died in 1916. My mother died in 1918.

Q. Upon the death of your father and mother were you left with any estate by them? A. I was left a share of my father's estate in

1915 which amounted to something—I do not remember exactly—two hundred and some thousand dollars, and my mother left me something so that it brought it up to $235,000 or $250,000.

Q. This brought the combined inheritance, in 1918, from both father and mother, to roughly a quarter of a million dollars? A. Yes, sir.

Q. And at that time Mr. Mitchell was with the National City Company? A. Yes, sir.

Q. You knew, of course, that he had his own private investment firm under the name of C. E. Mitchell & Company prior to that? A. Yes.

431 Q. And that he was making a life-work of business and the science of business banking? A. Yes.

Q. And you knew, even in those days, that he was doing a pretty good job at it, didn't you? A. I thought so.

Q. What investments did you make with this quarter million dollars and in what way did you make them—first, let me ask you if you did it yourself? A. No. I was left a one-third interest in the coal mines that my father had, and I sold that for cash to my older brother and then we asked Mr. Mitchell if he would invest what we had, Naturally, I felt that his experience was with investment banking and I felt that he knew investments in a skilled way, and I had had no experience.

Q. Did he undertake the investment as you requested? A. He did for a time.

Q. Do you mean by that that at some subsequent period, some one else undertook that work? A. Yes.

Q. Who was that? A. Edward Barrett.

Q. Who was he? A. An officer of the City Bank, a person whom I knew and in whom I had great confidence.

Q. Had you talked to Mr. Barrett from time to time about your estate? A. You mean when he was handling it?

Q. Yes. A. Frequently, yes.

Q. Mr. Mitchell did not definitely and absolutely relinquish his advisory capacity over your estate? A. No, but Mr. Barrett always dealt with me and submitted——

432 Q. (Interposing.) In other words, your contact in connection with your estate was with Mr. Barrett? A. Yes.

Q. You talked with him from time to time? A. Yes.

Q. And did that condition continue right on from the time he assumed the job, right straight through 1929? A. Just a minute; I want to be clear and accurate. As I recall it I think my account was taken out of Mr. Barrett's hands early in 1930 and put into the City Bank Farmers Trust Company.

Q. And from that time on that institution took care of it? A. Yes, and still does.

Q. Now, from time to time during your married life, did Mr. Mitchell make you presents of jewelry? A. Yes.

Q. Have you any idea as to the total amount of those presents? A. As I recall it they were insured for what they cost, and the figure in my mind is $87,000.

Q. In addition to that you had three homes, one in Southampton, one in New York, and one in Tuxedo? A. Yes.

Q. And you have, at those homes, some rare and valuable pieces of furniture? A. Yes, I have.

Q. Are those pieces that Mr. Mitchell picked out, or are they all your own selection? A. No, I selected them all.

Q. And were they also given to you by Mr. Mitchell? A. Absolutely; they are mine.

Q. Coming down to the fall of 1929, I think it is a fair question to ask what you did with your spare time by way of personal activities? A. I have always tried to be active in relation to
433 the committees raising money for certain charities, and particularly active in relation to work in the past eleven years, being chairman of educational concerts for young people and children, with a big orchestra in New York.

Q. Is it not a fact that your musical interests are the predominant interests in your life and that you have always given your attention and support in great measure to musical activities? A. Yes, musical educational activities in relation to music.

Q. And have you, from time to time, subsidized either young and struggling or struggling musicians whom you felt were deserving? A. Yes, I have.

Q. I forgot to ask you where you went to school? A. I graduated at the Georgetown Convent.

Q. Here in Washington? A. Yes.

Q. Have you always been interested in that institution? A. Yes, my interest has always been very active in that.

Q. And in view of that have you been on any Boards of Charities or connected with other charities in any way? A. I am serving as president of the Georgetown Alumni Association, for four years. That is educational.

Q. Contributions were made out of your own personal estate? A. Yes, I was overwhelmed with appeals, as everybody else was. I did not give to everything, but I did to a great many things.

Q. I suppose there were many times when the demands upon you exceeded your income? A. In the way of appeals?
434 Q. Yes. A. Oh, decidedly.

Q. Did Mr. Barrett, as officer and supervisor of your affairs, ever bring to your attention the amount of money that you were spending from your income? A. Yes, he remonstrated with me more than once.

Q. That is, he said you were spending more than you had coming in? A. That I was giving a little more freely than I should have.

Q. Well, in the fall of 1929 do you remember a certain incident which history now refers to as the stock market crash? A. Yes.

Q. Do you remember during those days of talking to Mr. Mitchell about any activity on his part in connection with National City Bank stock? A. I remember that he told me of an activity that he had.

Q. Just as well as you can remember it, in substance, will you tell the Court the conversation you had? A. In substance, as I remember it, Mr. Mitchell told me that he had the benefit of his institution shareholders, employees who had stock, that he felt that it was important to help that institution, and so he personally took securities and they represented a very large amount, and made a loan, one from J. P. Morgan & Company, and he made a loan in order to help his institution. I remember my saying at the time that in view of the large amount of money that he had borrowed and taken a personal responsibility, I remember saying: "Well, I do not see that you have any moral responsibility and it seems to me that you have done a thing that is very altruistic, possibly too altruistic."

435 Q. Do you remember whether the loan at Morgan's was a small or large amount? A. Oh, it was very large—I do not remember now, how much, but it was millions.

Q. You say that took place after the Fund—— A. (Interposing.) Well, I have not memorized any dates but as I remember it it was late in October, the 23th or 29th, or thereabouts.

Q. Do you place any dates after that as dates which you can remember. For example, during the month of November, do any events stand out in that month that are of particular significance to you? A. I do remember one date, the 12th of November, which was the birthday of my brother who was ill with cancer and I went to Chicago to be there on his birthday, and he was so ill that I was not permitted to see him except at very short intervals and I spent all the rest of the time that I was there with my brother Joe and his family.

Q. I want you to fix that date of November 12th in your mind because I wish to ask you if you had talked to Mr. Mitchell about the stock loan prior to your leaving for Chicago? A. Oh, yes; he told me that before I left.

Q. In Chicago you say you spent a substantial portion of your time with your brother Joseph? A. I had hours of conversation with him.

Q. What business was he in? A. He was retired from the coal business.

Q. Was he a man of substantial means? A. I think he had, at that time, about ten million dollars.

Q. Did you talk to him at all about National City Bank
436 stock during your visit? A. I should say that he talked to me because that day was a very bad day; things dropped tremendously. There seemed to be quite a bit of excitement. I was not downtown but in the late afternoon my brother told me that, and he said: "That is all the more reason why I am going to buy City Bank stock. I am very enthusiastic about it, and I feel that I will make a profit." And even the next day, when he put me

on the train, he urged me again to buy it and said that if City Bank stock was not worth what it was selling at then that it was not worth anything, and that he was going to buy heavily, which he did.

Q. Did you talk to him after that? A. Yes; I was in telephonic communication with him—I do not remember the times or dates—but I had long conversations with him, and at that time he was buying City Bank heavily and he was so imbued with enthusiasm that I got his enthusiasm.

Q. Mrs. Mitchell, I want to show you a letter which has been called Respondent's Exhibit H, and ask if that is your signature [indicating]? A. Yes; it is.

Q. You will notice the date? A. Yes.

Q. Now, in relation to this letter dated December 20th, did you talk to Mr. Mitchell about National City Bank stock? A. I had a very long talk with Mr. Mitchell the evening before.

Q. You place that definitely as the evening before the writing of this letter? A. Absolutely.

Q. Do you remember where it took place? A. Yes; it took place in my sitting room; I remember it definitely—on the third floor of our house in New York.

437 Q. Can you place the time of day? A. Not exactly. It was in the evening after Mr. Mitchell had come home.

Q. Will you tell the Court your best recollection of what was said by each one at that time? A. I cannot repeat the exact words but the substance of it was—I realized that Mr. Mitchell had just lost on this enormous amount of City Bank stock that he bought for the institution and he was going to take his loss and apply it to his taxes, which I knew was a perfectly legitimate thing.

Mr. GREENBAUM. I move to strike out the words "that it was a perfectly legitimate thing."

The MEMBER (Judge ADAMS). We will take that matter under advisement, for the present.

The WITNESS. Then Mr. Mitchell and I became enthusiastic and I knew my brother was doing something that was going to make a profit for him. He is a man of sound business judgment and experience and Mr. Mitchell explained that he was going to sell this stock and take a loss. I definitely understood in that conversation that he was going to sell the stock to somebody. He did mention the fact that, as the head of that institution, to sell that stock outside might easily affect the market. That is, stockholders' shares might go down, and so forth, and that was a perfectly easy thing for me to understand, but that was not the reason I bought it.

438 Q. What was the reason you bought it, Mrs. Mitchell? A. Well, I had a long talk with Mr. Mitchell——

Q. (Interposing.) I will withdraw that at the present time; finish the details of his conversation first. A. I was very anxious to buy that stock, provided I could buy it in the proper way. Mr. Mitchell told me that stock was carried in a loan at J. P. Morgan & Com-

pany. He told me that the loan was heavily protected and said that if I wanted to buy that it was up to me; he was going to sell it. And he would see a lawyer to be sure if it were perfectly proper and correct for me to do it, if I wanted to do it. So, after discussing it backwards and forwards, we had the idea that many people had at that time, that things were going to go up and not down like a toboggan slide, and I honestly felt just as my brother felt that I would make a great profit in that stock and Mr. Mitchell said: "Well, I think you will and I hope you do."

So we bought it with a full knowledge of how the stock was placed. We both said we would submit that to a lawyer before we bought it to be sure that it was absolutely proper.

Q. And you had many uses for that stock? A. Yes; I have done some very interesting things with it.

Q. Are you giving us your reasons now, or the conversation? A. My reason was that I wanted that stock for my estate, to either keep it there or sell it as I liked. The thought never was in my mind to sell it to Mr. Mitchell. I bought it for gain.

439 Q. You have never been a witness in court before, have you, Mrs. Mitchell? A. No, I have not. I wanted to very much last spring in our trial.

Q. And you have read the daily papers? A. Yes, I read the papers a great deal.

Q. And you read them with particular interest from about March 1933, or about a year ago? A. Yes.

Q. And followed them intensively through the spring of last year? A. Yes.

Q. But you have never testified to the matters which you have just told this Court in any court before, have you? A. No.

Q. You did, however, give some testimony before an Assistant United States Attorney in the office in New York, did you not? A. I did that twice, before Mr. Dewey and Mr. Gurfein, who were the assistant district attorneys in New York.

Mr. Moore. Have you gentlemen copies of such statement? (No response.)

By Mr. Moore:

Q. Have you given us the best of your recollection as to the events on the 19th? A. Well, of course, the conversation was a long conversation, Mr. Mitchell explaining everything to me so I would understand what I was doing and me telling him that I wanted to do it. I cannot remember it in detail. It was a very long conversation.

Q. You have read in the newspapers certain matters that have appeared to you as insinuations that you were connected with

440 an act that was not perfectly meritorious? A. I would qualify the word "insinuations" and I would include the word "statement" accusing me of doing business that way, and making those statements in the newspapers, and they were utterly false.

Q. I merely asked that question, Mrs. Mitchell, and your Honors, because I noticed that in giving your testimony you did vary from

the testimony, and you spoke with some feeling, and I wanted the information not to be misunderstood by the Court or by counsel.

Now, did anything occur after the 19th in connection with your acquisition of 18,300 shares? A. Mr. Mitchell did what he agreed to the night before and consulted a lawyer and put the whole thing before him; and he came from him and told me he had done that and so I——

Q. (Interposing.) Excuse me, Mrs. Mitchell—when did you talk to Mr. Mitchell after the 19th? A. The evening of the 20th.

Q. At your home? A. Yes.

Q. Did he have any papers with him at that time? A. He had a letter from me to him that was drafted, and a letter from him to me.

Q. I show you Respondent's Exhibit H and ask if that is the letter that you refer to from you to Mr. Mitchell? A. That is correct; I signed that letter.

Q. Did you read the letter before you signed it? A. I read it over carefully so that I would understand what I was doing.

Q. Did you notice that it says: "I acknowledge receipt of your letter of December 20th?" A. Yes, because he had another letter that he wrote.

441 Q. I show you another letter marked "Respondent's Exhibit G," and ask you if that is the letter you refer to in Exhibit H? A. Yes.

Q. Did you read that letter? A. Oh, yes, very carefully.

Q. Of course, you knew you did not have sufficient cash in your own sufficiency to buy that stock for cash? A. Oh, yes; I discussed that; that was part of our discussion the evening before.

Q. In fact, you knew that your entire personal estate did not equal or anywhere nearly equal the price of that stock? A. No—I do not think it was more than one million dollars.

Q. You knew that at the time you executed these letters? A. Yes, because it was explained to me that those shares were carried in a loan from J. P. Morgan & Company and I knew that they would be continued to be carried, and I had no expectation that the market would go down as it subsequently did.

Q. Did you notice anything in those papers which you saw on the 20th, a piece of paper which contained certificate numbers of shares? A. There was a little paper attached to a letter, with certificate numbers.

Q. I show you this paper [indicating], containing certificate numbers, and ask you if the paper that you saw was either a copy of that paper or substantially similar to it? A. As I remember it was a white paper—it was not this [indicating]. No, I saw such a letter, but this was not the letter I actually saw.

Q. This, of course, is a black photostatic copy, but it is your
442 recollection that such a piece of white paper was attached to one of the letters? A. Yes, I remember that distinctly.

Q. I notice the date of this paper that Mr. Greenbaum has just handed me as March 16, 1933. Does that refresh your recollection as about the time that you went down to see Mr. Dewey and Mr. Gurfein? A. Was that on Sunday? I went on Sunday for the first time, as I remember it, to the Bar Association; Colonel Donovan came in and spoke to me very briefly and asked if I would like to go to the District Attorney's office.

Q. I do not think we need to go into that. A. Well, I thought I could be permitted to say this, that I went with no preparation whatever to refresh my memory, and I had nothing to hide.

Q. I think we understand that, and I notice here the names Mr. Dewey, Mr. Gurfein, Mr. Donovan, Mr. Moore, and Mr. Thayer—that "Mr. Moore" was not me, was it? A. Oh, no.

Q. What was done with the paper he signed on December 20th? A. It went to Mr. Mitchell.

Q. And do you know whether he turned anything over to Mr. Barrett? A. He always turned everything relating to my affairs over to Mr. Barrett.

Q. Did you talk about that stock to Mr. Mitchell after December 20, 1929? A. I had a casual conversation with him because the stock went up some few months after I bought it.

Q. You do not follow daily market quotations in the newspapers, do you? A. No, but I follow them generally if I own such an important stock as that.

443 Q. You say "generally" it had come to your attention that the stock had gone up? A. Yes.

Q. What was your conversation with Mr. Mitchell? A. I just said that I was perfectly delighted that the stock had gone up and that I had the feeling that was shared by many other people that things were coming back and were on the upgrade, and so I held it.

Q. You continued to follow the public press through the spring of 1930, I presume? A. Yes; I follow the papers quite closely.

Q. Did you ever talk to your brother Joseph about the stock after you purchased it? A. The only conversation I remember distinctly was a considerable time later when I lunched with him—I do not know just where it was—but I lunched with him and his wife, and I discussed it with him then and I was worried because everything had gone so differently than I thought it would; and so I discussed it at length with him.

Q. How long after do you place that; was it after the spring of 1930? A. I think of it as being in the autumn—I am not sure.

Q. Coming down to March 1932, you do recall that Mr. Mitchell repurchased the stock; do you recall that as a fact? A. I recall that my counsel, in whom I have the greatest confidence——

Q. (Interposing). Of whom are you speaking? A. Mr. Guy Carey.

Q. Had he represented you in your personal affairs? A. Well, I looked to him as my lawyer and I had gone to him.

444 Q. He had prepared your will, had he not, sometime earlier? A. Yes; I think I had gone to him twice. I think they were both prior to 1932.

Q. With whom did you discuss the repurchase of the stock? A. It had never crossed my mind to sell the stock back to Mr. Mitchell until my counsel, in whom I have great faith, spoke to Mr. Mitchell and he had that conversation before he had spoken to me. He realized that my estate was dwindling to such a point, and speaking to Mr. Mitchell—and Mr. Mitchell repeated it to me, as I remember it—that there was a gift tax that was coming along and in view of the fact that my estate had shrunk as it had, that he felt it would be a protection to me in view of the loss I had suffered that I had not anticipated at all, that it would be a protection to me for him to repurchase this stock and he said in that way: "I think you should forgive the debt by repurchasing the stock." And Mr. Mitchell said he did not understand that legal term and Mr. Carey explained it and advised Mr. Mitchell to consult other counsel. Mr. Mitchell did that and went to Cravath. That was the first time that I ever thought of selling that stock back.

Q. After that you understood that the matter had been taken up with lawyers? A. Yes.

Q. And when you signed this paper, which I show you, marked "Respondent's Exhibit AA," you knew at that time that the paper had been either approved by or discussed with lawyers? A. Oh, yes; I knew that Mr. Swaine had been consulted and this is a confirmation of it.

Q. You knew that Mr. Carey and Mr. Swaine had been consulted? A. Absolutely.

445 Q. And the same as to Exhibit CCC? A. Yes.

Q. Did you read both papers which I have shown you before you signed them? A. Yes; very carefully.

Q. I want to call your attention, in particular, Mrs. Mitchell, to a letter, Respondent's Exhibit Z, and ask if that letter was shown you at the same time that you signed the other two papers? A. I remember that very clearly because there was a clause here, if you can call it a clause, that said: "This is to confirm my purchase from you of said shares and claims," and I was puzzled by the "claims," because I could not see how I had any claim against the City Bank. I did not rush and sacrifice my fortune for the Bank. I have never done anything for the Bank but Mr. Swaine had drawn this paper up and Mr. Mitchell at that time was contemplating bringing a claim against the Bank, and so Mr. Swaine, I was told, had put that in because it was a legal phrase that he thought should go in there because of this contemplated claim of Mr. Mitchell's.

Q. And that was a matter that you discussed with Mr. Mitchell when you inquired why this particular phraseology was used? A. Yes.

Q. Going back for a moment to December 20, 1929, did you ever have an agreement with Mr. Mitchell to sell that stock back to him

within 30 days? A. Why, there was not a word or thought of my selling the stock back to him.

Q. Did you have any agreement or understanding to sell it back to him, at any period of time? A. No; I had no intention whatsoever of selling it back to him.

446 Q. Did you tell him or have an understanding with him that you would give him the dividends on those 18,300 shares? A. Not at all; the dividends came to me regularly. I paid interest on the money to Mr. Mitchell.

Q. Did you have any idea that this acquisition of stock was to be only a convenience to enable Mr. Mitchell to take the additional loss? A. Not in any sense of the word. That is absolutely untrue.

Q. Did you have any self-interest? A. I did it only because I wanted to do it.

Q. Did you intend your acquisition to be an actual and bona fide acquisition of 18,300 shares of City Bank stock? A. Absolutely.

Mr. MOORE. You may inquire.

The MEMBER (Judge ADAMS). Cross-examine.

Cross-examination by Mr. GREENBAUM:

Q. Mrs. Mitchell, when you spoke to your brother, Mr. Joseph Rend, in December or November 1929, you said that he urged you to buy City Bank stock; is that correct? A. Yes.

Q. How many shares was he advising you to buy? A. He did not specify any particular number of shares. He advised me and urged me—I think that is not too strong a word—because he talked so strong to me about it.

Q. How many shares of City Bank did you have at that time? A. I do not remember.

Q. It was about 500, was it not? A. That I do not remember.

447 Q. Well, that is not disputed. Do you know when you saw your brother after November 1929? A. I cannot be certain when he came to New York.

Q. Don't you remember when he came to New York in January or February 1930, shortly after your other brother died? A. Frankly, I do not remember.

Q. If you will just try to bring your mind back to that, is it not a fact that Mr. and Mrs. Joseph Rend did come to your home in January, which was shortly after your other brother had died? A. They may have been in New York.

Q. Did they stay at the Plaza usually? A. Yes.

Q. Do you remember having lunch with them during January 1930? A. I do not remember that but I remember having a conversation with him.

Q. You have told us about one conversation when you said you were with him. A. Yes; but that was not as early as January 1930.

Q. Didn't you have a meeting with him prior to that at which you discussed National City Bank stock? A. That I do not remember.

Q. Do you know whether you ever saw your brother between December 29th and the conversation which you have related which

occurred in the fall of 1930? A. Well, they come to New York quite regularly and it would be my guess that I saw him because whenever he is here I see him.

Q. Was not the first time that you mentioned the fact that you had purchased City Bank stock from Mr. Mitchell, the first time
448 you told your brother, in the fall of 1930? A. That I do not recall.

Q. Mrs. Mitchell, you have no recollection of having told him within that period of time, have you? A. No; I have not.

Q. How much was the purchase price of these 18,300 shares that you purchased? A. I have not any figures here, but it was approximately three million eight hundred thousand dollars odd.

Q. And the interest, do you remember about how much that was? A. Mr. Greenbaum, I did know that at the time when I took on this transaction and became a party to the purchase of this stock. I do not remember now and I cannot tell you.

Q. Can you remember now what arrangement you made to take care of the difference in the amount of interest payable to Mr. Mitchell and dividends which you would receive from the stock, and you were going to make up the difference? A. I did not make any arrangement, Mr. Greenbaum. I bought that stock with the idea that it was going to appreciate in value. I always knew that I could sell the stock. I knew that my dividends were not adequate to meet the interest.

Q. You really did not think about it going down at all, did you? A. Of course, there was a possibility of its going down.

Q. Did you discuss that with Mr. Mitchell? A. No, I did not, because I thought all the time "I can sell the stock at any rate, even if I am completely wiped out."

Q. Do you know how the difference between interest and
449 dividends was made up, actually? A. No, I do not know that there was any arrangement.

Q. You do not know? A. Well, I know that the interest was paid when it fell due out of my income.

Q. Do you know that that resulted in an overdraft in your account with the City Bank Farmers Trust Company? A. Well, any overdraft would naturally come to my attention; the City Bank Farmers Trust Company would naturally notify me of any overdraft.

Q. And they did not notify you of any overdraft? A. Not to my recollection.

Q. Do you know that the dividends from the 18,300 shares found its way into your principal account on each dividend date? A. Yes; because——

Q. I think you have already answered that those dividends did go into the principal account; is that correct? A. Yes.

Q. You understand the difference between the principal account and the interest account? A. I do not know that I do.

Q. Do you know whether the dividends on this 18,300 shares were treated any differently than the dividends payable on your 500

shares that you bought before December 19th? A. No; the person who was handling my account, of course, received the dividends and paid out the interest.

Q. And you personally gave no instructions in regard to those items? A. Mr. Greenbaum, ever since I came into an inheritance and had some independent means, I never took care of details, because I put those details into the hands of somebody whom I
450 trusted to do absolutely the correct thing and they always reported back to me anything that a business man should report.

Q. Naturally, the person whom you trusted most and who had the greatest ability was Mr. Mitchell? A. Well, I consider that he is a very skilled investment specialist, you might say.

Q. And didn't you leave it in his hands? A. Not during this period; Mr. Barrett was handling it.

Q. Didn't Mr. Mitchell have anything to do with it? A. I do not think Mr. Mitchell has anything to do with the custodian account in the Trust Company.

Q. Did you ever discuss with Mr. Mitchell the possibility of selling any of the 18,300 shares after December 19th or 20th, 1929? A. I very deliberately did not do that because I was in a position to see business men of affairs working under the greatest stress in those hard times, harassed by tremendous worries and Mr. Mitchell was one of them. I did not mention that; certainly for about a year and a half I did not tell him anything about that.

Q. You naturally did not want to add anything to Mr. Mitchell's worries and troubles? A. I thought he had enough to carry.

Q. Is it not a fact that you did not discuss with Mr. Mitchell anything in reference to the 18,300 shares from December 20, 1929, until approximately March 1932? A. When there was that rise in the market, I think that in a casual conversation, I said that I was delighted that it was going up. That was the only time.

Q. You are sure that was the only time you discussed the matter with him? A. Yes.

451 Q. Didn't he ask you: "Don't you want to sell the stock?" or words to that effect? A. We had a little conversation about that, but he did not say: "Go and sell that stock." He considered that it was very nice and so did I.

Q. I will read from the statement referred to by Mr. Moore, of March 16, 1933:

"Did you ever consider selling the stock to take a profit in the spring of 1930? A. No. When it was about 40 points—I mean after it went up 40 points—I regretted that I had not sold it."

Do you remember making that answer? A. Yes; because subsequently it went down, and I regretted that I did not take advantage of that when it was up at the high peak.

Q. And the next question:

"Q. Did you ever discuss that with Mr. Mitchell? A. I never discussed, over a period of two years, that purchase that I had made from him in December 1929."

Is that correct? A. I did not discuss with Mr. Mitchell the question of any worry that I was involved in because of the going down of that stock. That is what I referred to. When I went to the District Attorney's office, with ten minutes' preparation, I knew nothing of what the intent of that remark was, and I did not discuss anything about that stock.

Q. Was that where the ten minutes' preparation—this is not statement made at the Bar Association? A. Well, I am incorrect about that.

Q. As I am informed, you had a meeting at the Bar Association on Sunday? A. Yes; Sunday morning.

452 Q. It was on Tuesday afterwards, I believe, that you went down to the old Post Office? A. Yes.

Q. Do you remember that there were several days that elapsed between those two meetings? A. Well, I do not remember how many days.

Q. Do you remember that at that meeting down in the old Post Office you had some lawyers with you? A. Yes.

Q. And that was Colonel Donovan and——A. (Interposing.) Yes; Colonel Donovan and Mr. Thayer, I think.

Q. And Mr. Moore? A. Yes; not this Mr. Moore here, though.

Q. So there were three lawyers representing you at that time? A. Yes.

Q. Did you only mention that, as you recall, during that meeting, that statement at one time, that I mentioned? That question is rather involved. A. Yes; I know exactly what I had in mind—I am afraid I will be repetitious—that was, that I said, I did not mention anything as to my worry in relation to the stock.

Q. And that is what you meant when you said you were asked the question: "Did you ever consider selling the stock to take a profit in the spring of 1930." And then your answer was: "No. When it was up 40 points—I mean after it was up 40 points, I regretted that I had not sold it." A. That is badly worded. The truth is that I did regret it later on, that I had not sold it.

Q. Later on you were asked about the March 1932 transaction, as follows:

"Q. Then that was the first time when you did discuss it

453 with Mr. Mitchell and I want to get clear whether that first time was when Mr. Carey spoke to him? A. Mr. Carey first spoke to Mr. Mitchell and Mr. Mitchell spoke to me.

"Q. And that was the first time you spoke about National City stock? A. Absolutely."

A. I meant by that that was the first time I spoke to Mr. Mitchell about selling back the stock.

Mr. GREENBAUM. That is all.

Mr. MOORE. That is all, thank you.

(Witness excused.)

Mr. WALLACE. I will call Mr. Forbes to the stand.

Whereupon, HARRY W. FORBES was called as a witness by and on behalf of the petitioner, and having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. WALLACE:

Q. How old are you, Mr. Forbes? A. I am 54.

Q. And what is your profession? A. Lawyer.

Q. You are the gentleman named "Forbes" who has been referred to in the testimony in this proceeding? A. In what I have heard of it; yes, sir.

Q. Well, has the law represented your life work? A. Yes, sir.

Q. What was your training for the practice of law? A. I
454 graduated from St. Lawrence University in 1898 and then studied for a year in Harvard, getting the A. B. in 1899, entered the New York Law School in 1904; was graduated in 1906 and admitted to the Bar in 1906 in New York, and have practiced in New York since then.

Q. Will you just spread that "A. B." on the record and tell us what that is? A. Bachelor of Arts.

Q. When did your active practice of the law begin and with what firm? A. At the time I got through law school I was in the office of two lawyers who had offices in New York, George G. Fraser and James R. Burnett.

Q. For how long? A. I think to the end of February 1907.

Q. Then, what did you do between that time and going to the firm of Shearman & Sterling? A. I was law clerk to Justice Chester B. McLaughlin, of the Appellate Division of the Court, in New York.

Q. Did he afterwards go on the Court of Appeals? A. Yes; on the Court of Appeals. I stayed with him until October 1910, and then I became connected with the firm of Shearman & Sterling.

Q. Has that connection continued ever since? A. Yes.

Q. Are you not now a partner in the firm? A. Yes.

Q. And have been for how long? A. Since about 1919 or 1920.

Q. How long has Shearman & Sterling been general counsel of National City Bank? A. Ever since my connection started with the firm, in 1910—before that.

455 Q. And how long as general counsel for the National City Company? A. The National City Company, I think, was formed in 1911 and we were counsel for them from that time on.

Q. To what extent, since the enactment of the first income tax law in 1913 have you devoted yourself to practice in income-tax matters? A. I studied the 1913 act quite carefully and it was the practice of the office to refer questions relating to that act to me and, after the great increase in income taxation starting with 1916 I have devoted a very substantial part of my time to questions of income tax.

Q. Have you tried to keep pace with the regulations and decisions on that subject as well as the laws themselves? A. Yes.

Q. You have been acquainted with Mr. Mitchell, I suppose, for a good many years? A. Yes.

Q. Coming to this December 1929 transaction that we are considering here, did he, about that date, or on that date, put before you and discuss with you an income tax matter of his own that he was then concerned about? A. He did.

Q. Did you understand he was coming to you to get your advice as a lawyer? A. Yes.

Q. Did you know that he intended to guide his action, or did you believe that he intended to guide his action, by your advice? A. Yes.

Q. Did you try honestly and to the best of your ability to discharge your professional duty in giving him advice on that matter? A. Yes, sir; I did.

Q. Will you tell the Board what was said by each of you at the time of December 20th if that was the date when he put the
456 matter up to you? A. As nearly as I can recall, when I went into his office—I received a message that he wanted to see me—and when I went into his office he said that he wanted to consult me about an income-tax question. He said he had a large block of National City Bank stock which represented a big loss and that he had arranged to sell the stock to Mrs. Mitchell, provided that he could take his loss for tax purposes by so doing and he wished my advice in that connection. I told him at once that the Treasury Department regarded all such transactions between husband and wife with a great deal of scrutiny and I asked him if that was stock which he really intended to sell, why he did not sell it in the open market so that there could be no question about the sale. He said that the stock which he wanted to sell was a block which he had bought without any intention of retaining permanently, and that it was a large block which he could not sell in the open market without causing the price to decline, which he did not want, and that besides that he felt confident that after the first of the year the stock would increase in value and that, for those reasons, he wanted to sell the stock to Mrs. Mitchell so that he could take his loss on the stock in his income-tax return for 1929 and let her realize whatever advantage there might be in disposing of the stock at the higher prices later on.

The conversation lasted considerably longer than that.

Q. Well, in the course of the conversation were any letters drafted? A. Yes.

457 Q. Will you state what was done about that? A. Well, I shall have to go back, I think, and explain the full conversation.

Q. Perhaps you had better complete the conversation and then we will take up the matter of the losses. A. He asked me if sales between husband and wife were not recognized for income-tax purposes, and I told him that they were where a sale was made in good faith for fair market value and the wife was financially responsible. He said there could be no question about that in this case because he was making an absolute sale to Mrs. Mitchell at the current market value of the stock and that she had resources of her own.

I then asked him if she could pay cash and take delivery of the stock and he said, "No; that she did not have the cash available and that he could not deliver the stock because it was pledged as collateral security for the loan with Morgan & Company." I then asked him if Mrs. Mitchell could take over the loan of Morgan & Company and he said that could not be done because the loan was for a much larger amount and covered by other collateral and he said that what he would like to do would be to sell her the stock and continue to carry it for her in the loan with Morgan & Company and he asked me whether that could be done. I told him I thought that could be done but that it would require a pretty carefully drawn agreement because of the difficulty in transferring title in stock subject to the pledge, and he said that that was what he wanted my advice on, and he called a stenographer and dictated such an agreement.

Q. Did you leave at that time? A. No, sir.

458 Q. Why not? A. He called a stenographer to dictate the agreement.

Q. Well, why did you stay? A. He said that was what he wanted to consult me on.

Q. Then I take it that something was dictated? A. Yes, sir.

Q. Well, why wasn't the agreement referred to in your talk? A. I asked him if he wanted a formal agreement and he said that usually his transactions with Mrs. Mitchell had been handled by letters and I said, "Suppose you dictate the letters and I will assist you with regard to the formal agreement."

Q. Did he dictate the letters? A. Yes; with subsequent changes.

Q. I show you now three letterheads, one marked "Respondent's Exhibit G"; do you recognize that letter as being in form like one of the letters that you say was then dictated? A. Yes, sir.

Q. And I show you Respondent's Exhibit H and ask you with regard to the signature if you recognize that as being in form like another of the letters that was then dictated? A. Yes, sir.

Q. I show you a photostat consisting of two sheets, marked "Respondent's Exhibit I," and ask you if you recognize either of those sheets as being in form like one of the letters dictated while you were there at that time? A. The letter addressed to Taff & Company was dictated at that time.

Q. That is Respondent's Exhibit I? A. Yes; Exhibit I.

Q. And what about the other one consisting of columns of

459 figures? A. That list of certificate numbers I never saw. The letter referred to a list to be attached which, of course, he did not have at that time.

Q. Why didn't you see the list at that time? A. He did not have it at that time.

Q. What have you to say as to whether you approved the form of those letters now marked as Exhibits G, H, and I, as they were then prepared? A. I did.

Q. Did you tell Mr. Mitchell what, in your opinion, would be the effect of those letters, when signed and delivered, upon the title to the 18,300 shares of stock therein referred to? A. Yes.

Q. What did you advise him about that? A. I told him that I thought that when those papers had been duly signed and the list of certificate numbers attached, that that would constitute a valid sale of the stock in question.

Q. Did you believe that that was the case? A. Yes, sir.

Q. What, if anything, was said about revenue stamps upon those papers, or any of them? A. To the best of my recollection the letters between Mr. and Mrs. Mitchell were dictated, and then the letter to Taff & Company dictated later when the stenographer was about to go and write the final copy of these letters and in that interval when the drafts were being drawn up, I think that one of us mentioned the question of stamps on the sale.

Q. What was said about it? A. I told Mr. Mitchell that stamps would be required and he asked me how much the tax would be, how much stamps should be put on, and I told him I could not tell
460 him that offhand, because it is rather complicated and there would be fractional amounts differing from the practice at the Bank, and I told him he had better find out later how much it should be from the transfer department of the Bank, because they were familiar with that and were handling transfers all the time.

Q. What shape were the letters in, the three referred to, at the time you left the conference? A. According to my recollection the letters between Mr. and Mrs. Mitchell were written first in draft form, and afterward when they were brought back, we made some corrections in them and then dictated at that time the letter to Taff & Company and he gave the correct draft back to the stenographer to write out the final copy, and also the letter to Taff & Company was written, of which I do not think I ever saw either the draft form or otherwise.

By Mr. WALLACE:

Q. Mr. Forbes, you would recall any of the features that represented suggestions from you in connection with those letters? A. I think so.

Q. Well, there has been spoken of here something about taking up the shares within 9 months; do you recall that provision. A. May I see the exhibit, please?

Q. Yes. (Handing document to witness.) Do you recall it? A. Yes.

Q. At whose suggestion was it? A. Mine.

Q. And how did it come about? A. When we came to the provision fixing the final date of payment Mr. Mitchell hesitated and I asked him how long he thought it would be before the stock
461 would be sold, or enough of it sold to enable it to be taken out of the loan, and he said by the following fall, and I suggested that he make liquidation of the indebtedness in any event within 9 months.

Q. And did you suggest anything about the interest on that date? A. When the question of the interest rate was under discussion, I asked him what interest he was paying on the loan and he said he did not wish to make a fixed interest rate because he expected to liquidate the Morgan loan within a few months and the stock might be put into another loan, or the interest changed; so he preferred to leave the interest rate whatever he had to pay for the carriage of the stock.

Q. What, if anything, did you suggest with respect to the feature covering the authority to sell? A. I told him that, if he expected to liquidate the Morgan loan he should have authority to sell the stock which Mrs. Mitchell had bought without consulting with her and apply the proceeds of the reduction to the indebtedness of the loan.

Q. And that was the reason for the provision authorizing him to sell that at $220 or better and make application—I think I have correctly quoted that? A. That was the reason for the provision in that letter which he signed authorizing him to sell at any time at $220 or more and the proceeds to be applied against the loan.

Q. I am particularly interested in having you tell just exactly what was said about the matter of notifying Morgan & Company? A. I told Mr. Mitchell that he would have to notify Morgan & Company of the transfer of title to the stock, and, as I recollect it,
462 he asked me why that was necessary and I said it was necessary in order that the dividends might be paid to Mrs. Mitchell as they would belong to her, and he then said that the dividends did not come directly through Morgan & Company but that they came through Taff & Company and I then said that Taff & Company should be notified.

Q. And that was the reason for the preparation of a letter to Taff & Company? A. Yes, sir.

Q. Was anything further said about Morgan & Company in the course of the talk? A. Near the conclusion of the interview I said that for Mrs. Mitchell's protection, he ought to notify Morgan & Company and arrange with them that Mrs. Mitchell would be permitted to withdraw her stock upon payment of $212 a share.

Q. What, if anything, did Mr. Mitchell say? A. His answer to that, as nearly as I recollect, was that there would be no difficulty about that, that he was confident Morgan & Company would be willing to let the stock go at that price and that in any event he expected to have the whole Morgan loan cleaned up within the next few months.

Q. And was that all that was actually said in the talk about notifying Morgan & Company? A. I think so; that is all I recollect.

Q. Now, I want to take up your connection with this feature that we have spoken of as the Management Fund; did you in the month of December 1929, counsel with any one connected with the National City Company about the payments made under the midyear or July

1929, distribution from the Management Fund? A. Yes, I did.

463 Q. Who was it that first asked you about it or brought the matter to your attention? A. Mr. H. F. Mayer, the vice-president and comptroller—I am not certain whether he was vice-president at that time or not.

Q. Of the——A. (Interposing.) Of the National City Company.

Q. When and where did your talk with him take place? A. He came into my office one day.

Q. In the office of Shearman & Sterling? A. Yes.

Q. In the building where the company offices were? A. Yes.

Q. Will you state what talk you had with him about the matter at that time? A. He asked me if I was familiar with the condition of the Management Fund and I told him I was not except in a very general way, and he told me that a payment had been made in the middle of the year but that owing to subsequent losses it was apparent that it was going to be all or part of an overpayment and that he thought he ought to have some sort of voucher from the officers who had received that money, acknowledging it, and I told him that I assumed that if there was an overpayment the officers would have to repay either in cash or by giving their notes.

Q. And you have told all that took place at that talk? A. All that I remember.

Q. Did you state that that talk took place about the middle of the month of December? A. It was early, yes.

Q. Well, I don't want to state a date to you; if you did not tell us please do so. A. It took place a few days before the 13th of December, if I remember rightly.

464 Q. When did you next have a talk with anybody about that matter? A. Within a day or two after that, or possibly the same day—very soon after.

Q. And with whom? A. Mr. Mayer and Mr. Byrnes.

Q. What took place when you saw them? A. Mr. Byrnes said that Mr. Mayer had told him what I had said, and that he, Mr. Byrnes, did not think it was fair to ask the officers to repay any part of the amount which they had received, in cash or by giving notes. He said they had received it, in the middle of the year, assuming it belonged to them and it would be very difficult for any of them to repay anything at that time.

Q. Did you say anything as to that? A. I told him that was a matter which directors of the City Company would have to determine and that I could not attempt to pass on it.

Q. That was all of that talk? A. No; there was a little more.

Q. Complete it, then? A. I asked him if he did not admit that there had been an overpayment and he said yes, it was apparent there had been an overpayment and that he would be willing to sign the receipt acknowledging that there had been an overpayment which must be repaid to the Management Fund before any distribution could be made and he thought that that was all that was fair to ask any of the officers to sign.

Q. Does that cover the talk in substance at that time? A. Yes.

Q. When did you next have contact with the matters and how?

A. Within the next day or two I had a telephone call from
465 Mr. Mayer and he asked me if I would have any objection to getting up a form of the receipt which he had mentioned there and I told him I would get up a receipt but would not attempt to pass on the effect of it, and I did so.

Q. If there was any alteration of that original receipt as you drafted it, made later, will you explain for the Board the nature of that alteration and how it came about? A. The receipt, as I remember it—if I can refresh my recollection from the exhibit [examining exhibit]—simply acknowledged the total amount of the payment and stated that a certain amount of it was a distribution from the Management Fund, and the rest was an overpayment.

Q. I am showing you a photostat now; is that what you would like to look at? A. Yes, sir; that is what I dictated.

Q. Is that your original dictation? A. Yes, sir.

Q. The paper you are referring to is a letter-size sheet carrying typewritten matter lined out at the top and written matter at the bottom; is that right? A. Yes.

Q. What is that other sheet that is attached to it? A. That other sheet is my transmittal letter to Mr. Mayer.

By Mr. WALLACE (Referring to Petitioner's Exhibit 56):

Q. Directing your attention to the upper part of the sheet, is that your original draft? A. That is a copy of it, a photostat of my letter of transmittal and my original draft which was the typewritten part.

466 Q. I don't suppose you know who ran the lines out through the typewritten part, or do you? A. No, I do not; I assume it was done at the time the handwriting was put on the bottom.

Q. Do you know whose handwriting is at the bottom? A. I believe that is Mr. Mayer's.

Q. Did you see it after the handwriting of Mr. Mayer had been put on the bottom? A. I was present when it was put on the bottom.

Q. Well, you know that on the original of this sheet, Mr. Mayer made the writing? A. Yes.

(Petitioner's Exhibit 56 offered and received in evidence.)

By Mr. WALLACE:

Q. Now, there appear a couple of interlineations in the written part in the fourth line and at the beginning of the fifth line; do you know anything about those? A. The beginning of the fifth line looks like my writing; I do not think the word "year" is; I am not certain about that.

Q. Do you recall the circumstances under which the insert at the beginning of the fifth line was made? A. This bottom writing, in handwriting, was written by Mr. Mayer in my presence, with Mr. Byrnes.

Q. Was that change made at the same time or at a different time? A. At the same time; yes.

Q. What became of the sheet after it was thus finished in that form? A. I left it with them.

Q. That is the last you saw of it, or did you see it later? A. No; that is the last I saw of it.

Q. You have told all that took place at the time when that writing took place? A. No; not entirely.

467 Q. Well, go ahead? A. At the time that was drawn, I met Mr. Mayer and Mr. Byrnes, again, and they explained to me that it was certain from their figures that the entire payment paid in July would be an overpayment, that there would be no balance in the Management Fund for distribution; so that the entire amount represented an overpayment, and, for that reason, it was necessary to employ the form of receipt which I had drafted.

Q. That is the reason for the change in writing, I take it? A. Yes.

Q. Did you have anything to do with the Directors' meeting that is spoken of here? A. No.

Q. Did you have any talk of any kind with Mr. Mitchell about the receipt during the periods that you have been referring now or even down to the time of the December 30th meeting of the Board of Directors? A. I at no time talked with Mr. Mitchell regarding the matter.

Q. You had nothing to do with the Board meeting itself? A. No.

Q. After the Board meeting did you have any talk with Mr. Winston of your firm about this Management Fund and the receipt? A. Yes; I did.

Q. About how long after the December 30th meeting did that talk take place? A. I should say it was during the following week.

Q. And where? A. In the offices of Shearman & Sterling.

Q. And the matter discussed was the Fund? A. The matter of the receipt.

Q. Will you tell us what took place at that time, about the receipt?

468 Mr. DEWEY. I think I must object to conferences between two individuals, neither of whom is a party involved in this matter.

Mr. WALLACE. Your Honor will recall that you asked, properly enough, one of the witnesses whether a written opinion had been rendered. I think it is important to know whether these opinions were given offhand or whether they were the subject of discussion. One way of finding that out is whether there was a written opinion, and another way is to find out whether they were simply shooting from the hip or whether they gave consideration, and this is for the purpose of showing whether they gave consideration.

The MEMBER (Judge ADAMS). I understand that this witness has already testified as to the circumstances under which this was given, and the manner, I understand, that you now propose, conversation between him and his associate taking place after the meeting of the Board at which the receipt was discussed and acted upon?

Mr. WALLACE. Yes.

The MEMBER (Judge ADAMS). The objection will be sustained.

Mr. WALLACE. But, if your Honor please, with due deference, you have not quite grasped the offer, and perhaps it was due to my inability to make myself clear. We are not offering this as bearing on any past facts. There was a subsequent discussion that arose a week after the Directors' meeting and that was how should
469 the company treat this payment when the matter had crystallized; how should it treat that payment in accounting for their own income to the taxing authorities, and you will recollect that the two letters are introduced here, one a notice to the taxing authority in January and the other a notice to the individual recipients of this Fund in the mid-year payment, and to those who had received money from the company.

The MEMBER (Judge ADAMS). The question, up to the time of the objection, had not indicated any such purpose as you now suggest.

Mr. DEWEY. I had in mind the purpose, having been through the same matters before, and I knew that the purpose of the question was to elicit the substance of a conversation between two lawyers as to a matter of taxability of income. If those two lawyers were present at that conference and a party to the proceeding, and he heard this discussion, I would consider it relevant. However, as I understand the offer there is no offer of any such testimony. There will be, as I understand it, an offer of it, from this witness and from another witness, of talks given by him concerning a Management Fund item. What conferences this witness had with a law partner of his, has no more relevancy to this proceeding, I submit, than would the conference that any one of a thousand people might have had on
470 the same matter. The only relevant testimony is these facts given by a lawyer to a party to this proceeding and that is not, as I understand, what is to be elicited from this witness.

Mr. WALLACE. Then Mr. Mitchell would have had to have gone into the law library with each of these gentlemen, seen them take the books down from the shelves, and study this question before we could prove that they did, in fact, study it.

The MEMBER (Judge ADAMS). I do not understand it to be so. I adhere to the ruling; the testimony will not be admitted and you may have your exception.

Mr. WALLACE. May I make an offer of proof?

The MEMBER (Judge ADAMS). I think that is very good practice.

Mr. WALLACE. The petitioner offers to prove in this connection that Mr. Garrard Winston, his partner, came to him and asked him about this receipt, if he had drawn it, spoke of the action of the Directors' meeting and said that the next problem that would confront them would be how the company should treat this payment in view of the adjustment that had been made by the receipt from a taxing standpoint and asking the witness if he had looked up the matter and requested that he investigate it and come to him with the results, and it was upon a discussion subsequent to that investigation that Mr.

Winston and this witness formed their opinion as to what the company should do as to reporting that item of $666,000, to
471 the State authorities, and the Federal taxing authorities.

The MEMBER (Judge ADAMS). You may have your exception, together with the statement made, which will become part of your exception.

Proceed with your examination.

By Mr. WALLACE:

Q. Did you have any reason, after the meeting of December 30, yourself, to investigate the law question as to how the National City Company should treat that item of the mid-year July 1929, distribution, from the standpoint of its own income tax return? A. I did.

Q. Over what period of time did your examination of the matter extend? A. Several days.

Q. To whom, if any one, did you report the result of that examination? A. My partner, Mr. Winston.

Mr. DEWEY. I ask that the question and answer be stricken as irrelevant.

Mr. WALLACE. That is the actual explanation.

The MEMBER (Judge ADAMS). Assuming that petitioner will follow this statement, that it is merely preliminary, and showing that Mr. Winston gave advice, I will overrule the objection.

Mr. WALLACE. That is right.

Mr. DEWEY. May I state that the reason for my motion and the ground of it, was that the advice transmitted by one lawyer
472 to another is not relevant in this proceeding. The only relevant testimony on this subject can be advice by a lawyer to a client and not conferences between members of a law firm.

The MEMBER (Judge ADAMS). I have excluded the conference. The fact that they did confer about it, if it is followed by the testimony that Mr. Winston gave advice, I believe that to be admissible.

Mr. DEWEY. May I have an exception?

The MEMBER (Judge ADAMS). Yes.

(Testimony omitted, relating to 1930 transaction not under review.)

Q. And either in the advice that you gave Mr. Mitchell in this matter, or the advice that you gave him in the matter of the sale of Mrs. Mitchell of the 18,300 shares, did Mr. Mitchell attempt to influence your advice or to influence you to any particular kind of advice in the matter, in any way? A. No.

Mr. WALLACE. You may cross-examine.

Cross examination by Mr. DEWEY:

Q. At the time you conferred with Mr. Mitchell about the proposed sale to Mrs. Mitchell, you have told us the conversations that you had with him at that time, in full, now, have you? A. Practically, I would not be certain that I have not omitted some minor details.

Q. In connection with your advise, as I understand it, you
473 told him that the sale would be valid for tax purposes if the sale were at a fair price, if it were unconditional and final

and to a buyer who was financially responsible; is that correct? A. I told him that a sale between husband and wife under those conditions would be recognized.

Q. Well, that is what you were discussing with him, was it not? A. Yes.

Q. In connection with the financial responsibility of the purchaser, did you inquire as to how much Mrs. Mitchell was worth? A. No.

Q. You advised that the sale was valid for tax purposes, and when you know that Mr. Mitchell was going to rely on that advice, were you then acquainted with the amount of Mrs. Mitchell's worth? A. Not exactly; no.

Q. Were you approximately? A. Mr. Mitchell had told me, in response to that question that she was financially responsible and I had known for a considerable time before that she was a woman of substantial and independent means.

Q. So I understand, "substantial and independent means" is a very flexible term, isn't it, Mr. Forbes; that is, wouldn't you agree with me that there are many people who believe $100,000 to be a very substantial sum of money? A. Oh, I had no doubt that she had a considerably larger private fortune than that.

Q. Well, if she had only $100,000 you would agree that the sale was not to a wholly financially responsible person?

Mr. WALLACE. I object to that as being argumentative.

474 The MEMBER (Judge ADAMS). I will overrule the objection. It is a matter of cross-examination.

Mr. WALLACE. Exception.

By Mr. DEWEY:

Q. Would you agree with that? A. I would hesitate to fix any definite amount.

Q. I just want to get this clear. You gave advice to Mr. Mitchell that this sale was valid for tax purposes, did you not? A. That I thought it was; yes, sir.

Q. Did you ever qualify that advice in any way? A. I don't think so.

Q. You knew that he was going to rely upon it? A. I thought he was.

Q. And it was your understanding that he was going to act upon it, was it not? A. Yes.

Q. And at the time you gave that advice you had no positive information of any kind or character as to the financial responsibility of the purchaser, so-called, did you? A. Not as to the size of Mrs. Mitchell's present fortune.

Q. You did not know whether she had $100,000 or $100,000,000, did you, Mr. Forbes? A. I was satisfied that she had in the neighborhood of $1,000,000, at least.

Q. By reputation only? A. By reputation and by Mr. Mitchell's statement that she was financially responsible.

Q. You mean that in the last resort it became solely a matter of reliance upon his statement that she was financially responsible? A. That, plus my best knowledge of what she was worth.

Q. But you had no knowledge of how much of a fortune she had? A. No.

475 Q. And that advice rested——A. (Interposing.) At least on knowledge that I had that she had an independent fortune.

Q. You mean reputation knowledge, don't you, hearsay gossip? A. Well——

Q. It was just hearsay and gossip? A. No personal investigation, certainly.

Q. Wasn't it just gossip upon which you based it?

(Objection by petitioner's counsel overruled and exception granted.)

Q. Wasn't it just gossip on which you based it? A. I had been told by various people who I believed were in a position to know, that she was independently wealthy and had an independent fortune.

Q. At the time of this conference with Mr. Mitchell, December 20, 1929, was there any discussion as to Mrs. Mitchell's ability to pay the interest on the obligation which she would assume if she signed those papers in good faith? A. Not as I recollect.

Q. Did you stop to compute how much even 5 per cent interest on $3,800,000 would be? A. No, I did not.

Q. Did you stop to consider, or did you discuss with Mr. Mitchell, how much the difference between 5 per cent on $3,800,000 and $4 a share on 18,300 shares would be? A. No.

Q. You know, now, that it is about $120,000 a year, don't you? A. I know that it is a substantial amount. I never have computed the figures myself.

476 Q. Did you ask Mr. Mitchell whether Mrs. Mitchell had property which was in such condition that she could carry such a financial burden? A. No.

Q. Was there any mention of that subject made at any time prior to the time that you gave your opinion to Mr. Mitchell? A. Not so far as I remember. I did mention that she would be receiving the dividends on the stock and that she would be paying the interest, but I do not think the amounts and the difference in the amounts, were mentioned.

Q. There was no discussion on that subject at all? A. Only to the extent that I have stated.

Q. Did you have any discussion with Mr. Mitchell of any kind about the subject of gifts by him to her? A. No.

Q. Did he tell you that, in the event the transaction stayed on the books as it was, for not 9 months, as set forth in the agreement, but 5 months and 10 days, that within that time he would give her large sums of money? A. No.

Q. Did he tell you that he had in contemplation that before the expiration of the 9 months that he would give her, by June 4, 1930, $40,000 odd of securities, following her first interest payment to him? A. No, sir.

Q. Was any such subject discussed? A. No; I do not think so.

Q. Was the subject discussed as to the possibility of his, within 8 months, still less than the 9 months referred to in the agreement, making large cash gifts to Mrs. Mitchell?

Mr. MOORE. I object to the question. It is not customary to sum up a case through the guise of cross-examination. I think this
477 is wholly without cross-examination; I think we could go through a whole case and put it in that form.

The MEMBER (Judge ADAMS). Overruled.

Mr. MOORE. Exception.

By Mr. DEWEY:

Q. There was no discussion of that question? A. No.

Q. Now, did Mr. Mitchell advise you at this December 20, 1929, conference that the stock which was the subject of this discussion was subject to a debt to J. P. Morgan & Company of approximately $6,000,000? A. He did not tell me the figure. He said that the stock was pledged, with other stock, for a large loan with Morgan.

Q. Then you were aware at the time of this conference that the 18,300 shares under discussion was subject to a loan very much in excess of the amount of the purchase price, were you not? A. Yes; considerably.

Q. Some $2,200,000 in excess of the purchase price? A. I did not know the definite figure.

Q. Did you inquire, Mr. Forbes? A. No.

Q. Didn't you consider that a relevant question before you gave your advice? A. I did not think that it affected the validity of the sale.

Q. You did not think that it was relevant to consider how much of a lien that stock was subject to through Morgan? A. No.

Q. Let me ask you: What was your understanding of what Mrs. Mitchell acquired by the execution of those letters? A. Title to the stock, subject to the pledge to Morgan.

478 Q. Is it a fair statement—and correct me if it is not—to say that the very maximum from a legal standpoint only, that the very maximum that Mrs. Mitchell acquired by reason of the execution of those letters, was a legal right to pay to Morgan & Company $6,000,000 for the purpose of acquiring the 18,300 shares of stock?

Mr. MOORE. I object again on the ground that the papers are in evidence and that the Court is fully competent to decide the law on the subject as to what rights those papers bestow.

The MEMBER (Judge ADAMS). We are examining a witness who has talked as an expert on matters or circumstances to which he gave the advice upon which petitioner relies. Objection overruled.

Mr. MOORE. Exception.

Mr. DEWEY. Will you be good enough to read the question, please, Mr. Reporter?

(The question referred to was read aloud by the Reporter as above recorded.)

The WITNESS. No; I do not think so.

By Mr. DEWEY:

Q. What in my statement is incorrect, Mr. Forbes? A. My view of the law is that, by the sale, Mrs. Mitchell acquired title to these particular shares of stock subject to the pledge to Morgan.

Q. That means subject to a six million dollar pledge, does it not? A. It was pledged with other stock for a large loan.

479 Q. And you know, as a matter of law, that Morgan had the right to retain all of that stock until and unless Morgan was paid six million dollars? A. Morgan had the right under the pledge, I admit that.

Q. Then wasn't my statement correct that all Mrs. Mitchell acquired, from the practical standpoint under the law was a right to acquire physical possession of this stock upon the payment of six million dollars? A. No; I do not agree with that statement, Mr. Dewey.

Q. Without considering legal title now, the most that Mrs. Mitchell could get under that agreement, and the only way she could get possession of her stock was by paying six million dollars, isn't that so? A. Not necessarily; no.

Q. You mean that if Morgan wished to be generous or courteous they could give her her stock upon payment of the loan? A. I mean that if Mr. Mitchell had paid off the loan she would have been entitled absolutely to the stock on payment of the purchase price.

Q. And, of course, if Morgan was generous they could have given all of the stock without paying any——

The MEMBER (Judge ADAMS) (interposing). I think that is sufficient on that subject.

By Mr. DEWEY:

Q. Did you have that problem in mind at all, Mr. Forbes, when you gave the advice to which you have testified? A. What problem?

Q. The problem of how Mrs. Mitchell could ever get possession of the stock which you were advising had been legally sold to her.

480 Mr. MOORE. I do not want to foreclose discussion but counsel is going right on.

The MEMBER (Judge ADAMS). I understand he is asking him what he had in mind at the time.

Mr. MOORE. Then I make no objection.

The WITNESS. Mr. Mitchell told me, as I have already testified, that he expected to sell off a part of the stock and liquidate his loan with Morgan & Company, in the near future, and I assumed that the loan would be liquidated in the near future, but if you have in mind the problem concerning this six million dollars indebtedness with relation to Mrs. Mitchell's right to acquire her stock for the purchase price of $3,800,000, I believe that Mr. Mitchell has the right to arrange with Mrs. Mitchell to withdraw that.

By Mr. DEWEY:

Q. And did you explain the purpose of that arrangement? A. I do not think we had any lengthy discussion of it. I simply said that for Mrs. Mitchell's protection.

Q. Then you did not advise Mr. Mitchell that the only purpose for notifying Morgan & Company was the collection of dividends? A. No.

Q. Anyway, this is clear, that you did advise Mr. Mitchell that he should notify Morgan & Company for the purpose of maintaining Mrs. Mitchell's right to procure from them her stock so sold? A. Well, I told him that for Mrs. Mitchell's protection, he ought to notify Morgan & Company and arrange to allow Mrs. Mitch-
481 ell to obtain her stock upon demand and payment of the purchase price.

Q. That is what I meant. Now, at the time of this conference, did you advise Mr. Mitchell anything with reference to the deductibility of this alleged tax loss in the event that he should have any arrangement for the repurchase of the stock? A. I don't think that subject was mentioned.

Q. What was your particular specialty in the firm, aside from tax problems—anything, Mr. Forbes? A. No; I don't think so.

Q. How much of your time would you say you would give to tax problems? A. Oh, probably two-thirds or three-quarters; it varies at different times. Sometimes I am engaged wholly on tax problems, and others, not so much.

Q. What other problems do you handle besides tax problems? A. Usually general corporate work.

Q. For any particular clients? A. No; I would not say for any particular clients. We get many men from various banks to consult us.

Q. You are known throughout the National City group of institutions as the tax expert of Shearman & Sterling, are you not? A. I——

Q. (Interposing.) Well, perhaps you do not want to be in the position of asserting your own qualifications. You are known throughout those institutions as the partner in Shearman & Sterling who specializes in that class of work? A. There are some others who do almost as much as I do, but, in general, those questions are referred to me.

Q. And you handle, for the National City group of insti-
482 tutions, mostly those questions? A. I do not handle, by any means, all the tax questions.

Q. I will ask you if you have anything more to say on that subject? A. No; I would say that I get other incidental questions besides tax questions.

Q. But your primary function is in tax matters; is that right? A. Yes.

Q. And your firm primarily handles matters for the National City Bank, that is, the Directors and senior officers? A. Well, I would not like to attempt to say, Mr. Dewey.

Q. All right; and you would not like to attempt to say as to that with respect to the City Company? A. No.

Q. It is a fact that Mr. Cary is a member of the Board of Directors of the National City Bank, and that Mr. Winston is a member of the Board of Directors of the National City Company? A. Yes. The National City Company is now the City Company of New York.

Q. I mean at the time we are discussing in this case? A. Yes.

Q. That is a correct statement, is it not? A. I think so.

Q. Mr. Winston handled most of the corporate matters of the National City Company, did he not? A. I should prefer not to attempt to answer that.

Q. Well, as a member of the Board of Directors, he was the member of the firm who was most familiar with those particular matters, was he not? A. I will say yes, but he had a very wide clientele.

Q. You were not familiar with the Management Fund questions in December 1929? A. No.

483. Q. Have you ever drawn a Management Fund resolution in your whole life? A. I do not think so.

Q. Have you ever passed upon a Management Fund question prior to December 1929? A. No.

Q. Can you tell me any reason in the world, why the National City Company came to you instead of to Mr. Winston with reference to drawing the receipt in connection with the Management Fund, in December 1929? A. I can tell you why Mr. Mayer came to me.

Q. Why? A. I had known him for several years before he became connected with the National City Company. And when he first came to me I asked him why he had not seen Mr. Winston, and he said he had tried to, but was not able.

Q. Mr. Winston was in the city then, wasn't he? A. I think he had just come back, but he was very busy.

Q. There were further conferences with regard to the drawing of that receipt, after the first day? A. Yes.

Q. There were three, were there not? A. Not three after the first day.

Q. When you drew that receipt, Mr. Forbes, is it not a fact that you advised all the gentlemen that you were unfamiliar with the Management Fund and that you could give them no advice on the subject? A. I told them that I would not attempt to pass on that question as to whether that receipt was a proper settlement of the overdraft payment question.

Q. Did you refer them to your partner, Mr. Winston? A. I told them it would have to be passed on by the Board of Directors,

484 and I think I told them they should see Mr. Winston. I know I tried to see him myself, but was not able.

Q. You know as a matter of fact that they did not see Mr. Winston? A. I have been told they did not.

Q. Did you ask them whether they had seen Mr. Winston? A. No; not after this final receipt was drawn.

Q. Didn't they ask you about the tax aspects of this situation, if they had a receipt like this? A. No, sir.

Q. Did not say a word about taxes? A. No, sir.

Q. Did not say a word about whether it would be taxable if you drew this receipt in this form? A. No, sir.

Q. When you first advised them, you told Mr. Mayer that they ought to pay the money back or give a note? A. I told them that I was not familiar with the resolution.

Q. What did Mr. Mayer say to that? A. So far as I can remember he did not say anything, but simply left the office.

Q. Mr. Mayer was one of the executive officers of the National City Company? A. He was the Vice President.

Q. But there were several executives senior to Mr. Mayer? A. Yes; I think he was Vice President, Comptroller in charge of accounting.

Q. Did Mr. Mitchell tell you he notified Morgan & Company of the sale to Mrs. Mitchell? A. No.

Q. And, when you advised him that he should notify Morgan & Company, did he say anything to you to indicate he would not notify Morgan & Company of the sale? A. No.

485 Q. Now, after that conversation, did he at any time tell you that he was not the owner of that stock? A. No.

Q. Did he at any time tell you he was acting in any capacity in reference to that stock on behalf of another party? A. No.

Q. Did he at any time in the course of that discussion tell you that he felt that the National City Company was the real owner of the stock? A. No.

Q. Did he tell you that he felt they were responsible to reimburse him for his losses on the stock? A. No.

Q. Did he at any time in that conversation tell you that he had in mind asking them to take the stock over and pay Morgan & Company the amount of the loan? A. No.

Q. The subject was not even mentioned? A. No.

Q. When, for the first time, did you learn that Mr. Mitchell was asking, or had asked the National City Company to take that stock over, and pay the amount of the Morgan loan? A. I do not think I learned that at any time, I knew some time about the close of 1931 or the beginning of 1932, that there was a question of that kind raised, but at no time did I know the details of it.

Q. Now, in the course of that conversation, did you discuss with Mr. Mitchell the nature of a valid sale for tax purposes as distinguished from an invalid sale for tax purposes? A. I told him what I understood to be the requirements for a valid sale.

Q. And, did you advise him that a valid sale might be made
486 with any understanding, express or implied, as to a repurchase of the stock? A. I do not think the question of repurchase of the stock was mentioned at any time in our discussion.

Q. Neither repurchase, nor cancellation of the sale or anything of that kind? A. No.

Q. Now, in your opinion, Mr. Forbes, is a sale valid if there is an agreement to repurchase, or understanding for repurchase of the stock, or an option to repurchase stock sold for tax purposes? A. In my opinion, the loss on a sale where there exists such option or agreement is not a deductible loss, and cannot be claimed for tax purposes.

Q. Isn't it a fact, or isn't it the law as you understand it, Mr. Forbes, there is no sale if there is an agreement or understanding for the repurchase of the stock? A. Well, my understanding is there is not any sale recognized for tax purposes as a deduction.

Q. But, under the law, is there a sale at all? A. I think that is quite debatable as a question of law.

Q. Did you ever discuss with Mr. Mitchell the validity of the sale at any time if the sale was in fact covered by an option to repurchase the stock, or an option for repurchase? A. No, sir.

Q. Do you recall the opinion which you wrote in connection with capital gains and losses in the year 1931? A. I thought you meant—my answer still stands.

Q. I show you, Mr. Forbes, Exhibit 55 and ask you whether you prepared that paper. A. Yes; I did.

Q. Now, I direct your attention to the next to the last para-
487 graph which reads, "accordingly where a person has held securities for over two years, which he wishes to sell at a loss for tax purposes, he should first sell the security and then repurchase it within thirty days (which can be arranged by option or agreement to repurchase, if desired)." Do you recollect writing that sentence? A. Yes.

Q. And then, I direct your attention to the final paragraph which reads as follows:

"In considering that procedure, two points should be borne in mind, first the possibility that the ruling may be revoked (referring to the ruling of the Internal Revenue Bureau). I believe though there do not appear to be any grounds for revoking it, or that the statute may be amended, although it is not likely such amendment would be retroactive to 1931. Second, on the Wash sale, the transfer of the securities should be established beyond question, all stamp taxes on the sale of stock being paid, so that no question in that respect can be raised."

Do you recall writing that paragraph? A. Yes; that is my memorandum, but I did not send it to Mr. Mitchell, or have any discussion with him about it.

Q. Was it your understanding at the time you wrote that memorandum there could be a valid sale for the purpose of breaking the two-year continuity of ownership, under the capital gains and loss provision of the law, if that sale was covered by an option to repurchase? A. I understand the Treasury Department has some
rule, and the ruling was quoted in my memorandum.

488 Q. Did you ever have any idea a sale could be valid for income tax losses regularly to be taken on a return, if it were

covered by a repurchase agreement, or option to repurchase? A. No, sir.

Mr. DEWEY. That is all.

Re-direct examination by Mr. WALLACE:

Q. How many times was the matter of notifying Morgan & Company referred to in your talk of December 20, 1929? A. Twice.

Q. And was it the first or the second reference that had to do with dividends? A. The first.

Q. There was other talk in between the two references to notice? A. Yes.

Q. Have you told us heretofore just exactly what you said in the second reference, and just exactly what Mr. Mitchell said in the second reference? A. As nearly as I can remember it.

Q. You were asked if Mr. Mitchell told you that he would have notified Morgan & Company in connection with your second advice as to the protection of Mrs. Mitchell. I ask you if he told you he would notify Morgan & Company in connection with that second suggestion? A. My recollection is that when I told him that he ought to notify Morgan & Company for Mrs. Mitchell's protection, so as to arrange with Morgan & Company to permit her to withdraw the stocks on payment of the purchase price, his reply was to the effect there would be no difficulty about that feature. He was certain Morgan & Company would consent to have it withdrawn, and he also expected to have the Morgan loan completely liquidated within a few months anyway.

489 Q. And whatever indication there was from what Mr. Mitchell said about it grew out of that statement that you have just repeated to us, isn't that so? A. As far as my own understanding; yes.

Q. Now unfortunately I left you in the library when you went to investigate that question of the company's tax position, or the situation created by the receipts. Did you bring the results of your investigation to Mr. Winston?

Mr. DEWEY. I object to the subject of a discussion between the two gentlemen. If they had a conversation on a given date, I do not object, but I object to any reference to the subject matter of the result of an investigation.

The MEMBER (Judge ADAMS). Objection overruled.

Mr. DEWEY. We note an exception.

The MEMBER (Judge ADAMS). You may have your exception.

A. I did.

By Mr. WALLACE:

Q. Did you have any discussion with him about the results of your investigation? A. I did.

Q. And did this discussion between Mr. Mitchell, Mr. Winston, and yourself, occur before any expression of opinion from Mr. Winston or anyone else upon the matter?

(Objection by respondent's counsel overruled and exception granted.)

A. I cannot answer that from my own knowledge, for I do not know.

490 Q. If you had been told at the time of your December 20th conference with Mr. Mitchell, and your advice to him, that Mrs. Mitchell at that time was worth the sum of $940,000, would that information have varied in any way the advice that you gave him?

Mr. DEWEY. I object to that question as speculative. This is redirect examination.

Mr. WALLACE. Counsel asked $1, $1,000,000, or $1,000, and now he objects to the question affecting the advice of this witness based upon the actual facts in this case, and calls it speculative.

Mr. DEWEY. He was not advised of that fact, and how can he now tell us what he would have done in December 1929? I submit the question is improper.

The MEMBER (Judge ADAMS). The question arose primarily upon cross-examination. The cross-examination rule is quite different from that of redirect. The objection will be sustained.

Mr. WALLACE. I note an exception.

The MEMBER (Judge ADAMS). You may have the exception.

Mr. WALLACE. And an offer to prove that would have had no effect whatever on the advice then given.

By Mr. WALLACE:

Q. I believe you have stated that you did not show this paper, Exhibit 55 to Mr. Mitchell? A. No; I did not show it to him.

Q. Was it prepared at his request? A. No.

491 Q. In your opinion was any notice to Morgan & Company as to the making of this sale to Mrs. Mitchell essential to the validity of the sale, or to the transfer of title to the shares to her?

Mr. DEWEY. I object to that.

The MEMBER (Judge ADAMS). The objection will be sustained.

Mr. WALLACE. I take an exception.

The MEMBER (Judge ADAMS). You may have the exception, and you may put in the record that which you expect to prove.

Mr. WALLACE. I expect to prove that in the opinion of this witness a notice to Morgan & Company was not in any manner essential to a valid sale and transfer of title to Mrs. Mitchell.

The MEMBER (Judge ADAMS). I so understand, and on that theory I sustain the objection.

By Mr. WALLACE:

Q. Did you ever hear of Internal Revenue Decision 2043? A. Yes, sir.

Q. Did you have that decision at your command during the time when you were looking this question up as you testified? A. I found it.

Q. You found it at that time? A. Yes, sir.

Q. To whom did you furnish it shortly after that.

Mr. DEWEY. I object to the question unless it is indicated it was to the petitioner.

The MEMBER (Judge ADAMS). I think the question is indefinite. It might have been furnished to many people.

492 By Mr. WALLACE:

Q. Did you furnish that decision to Mr. Garrard Winston, your partner, after your investigation?

Mr. DEWEY. I object to that as irrelevant and incompetent and entirely immaterial.

The MEMBER (Judge ADAMS). I understand that this testimony will be followed by advice from Mr. Winston?

Mr. WALLACE. Yes, sir.

The MEMBER (Judge ADAMS). The objection will be overruled.

Mr. DEWEY. May we have an exception?

The MEMBER (Judge ADAMS). You may have the exception.

By Mr. WALLACE:

Q. Did you say when you found the decision; you mean you found it during the course of your investigation? A. Yes.

Q. You are now referring to IT 2043? A. Yes, I found it during the course of my investigation, and called it to the attention of Mr. Winston.

Mr. WALLACE. That is all.

Mr. DEWEY. No further questions.

The MEMBER (Judge VAN FOSSAN). There is one question I would like to ask, Mr. Forbes. In the conversation with Mr. Mayer, there was an expression quoted by you, there would be no balance in the Management Fund. Do you recall that?

The WITNESS. Yes, I think so.

493 The MEMBER (Judge VAN FOSSAN). I wonder what was meant by that expression.

The WITNESS. As I understand it, the Management Fund was accrued monthly. Each month they accrued a certain amount, and credited the Management Fund, and when the payment was made in July, there was a very large amount to the credit of the Management Fund, to which the payment was charged. Owing to losses later in the year, the Management Fund was diminished so enormously that the payment in July showed a red figure, and my original understanding was the loss had not entirely wiped out the balance of the Management Fund, so a portion of the payment in July was a payment for which the company had funds.

The MEMBER (Judge VAN FOSSAN). That was your understanding at the time?

The WITNESS. That was my understanding when I drew the original receipt, the typewritten part which has been stricken out—I drew it with the understanding that the Management Fund was only partially wiped out, so a part of the payment made in July the officers were entitled to it.

The MEMBER (Judge VAN FOSSAN). What was your subsequent understanding that resulted in the striking out of the section to which you have just referred?

The WITNESS. At the final conference they told me the Management Fund would be entirely wiped out; that the losses during the latter months of the year were sufficient to leave no balance whatever in the Management Fund, leave no amount distributable.

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The MEMBER (Judge VAN FOSSAN). Did it leave the fund in the red, or just wipe it out so far as the year was concerned, or was it possible for this fund to go into the red?

The WITNESS. My understanding, which is subject to correction by the auditor who knows of the results, that there was no Management Fund whatever so that the entire payment made in July showed as an overpayment, as a red figure.

The MEMBER (Judge VAN FOSSAN). Very well.

The WITNESS. Do I make myself clear?

The MEMBER (Judge VAN FOSSAN). I get your point.

By Mr. WALLACE:

Q. Now, I would like to ask when the amount was determined at the end of July in the fund accumulation for the first month, and you went into the second month, whether there began that second month with the balance that appeared in the fund at the end of the first month, and carried it forward. A. I cannot answer that of my own knowledge, for I am not familiar. I think that that was the way it was done. If I have not made myself clear in answer to Judge Van Fossan's question, I would like to.

The MEMBER (Judge VAN FOSSAN). I understand your view of it, and what you understood at that time.

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The MEMBER (Judge ADAMS). I would like to ask the witness one question. Mr. Forbes, did Mr. Mitchell ask you what would be a good faith sale?

The WITNESS. No.

The MEMBER (Judge ADAMS). He knew what would be a good faith sale?

The WITNESS. I assume he did.

The MEMBER (Judge ADAMS). Did you understand or not what would be evidence of a good faith sale?

The WITNESS. I do not quite understand your Honor's question.

The MEMBER (Judge ADAMS). Whether certain conditions would tend to prove a good faith sale, or tend to prove whether a sale to the wife would be a sale tending to prove or disprove good faith; was that one of the things you were attempting to advise on?

The WITNESS. I told him at the outset of our discussion that the Treasury Department looked with strict scrutiny on all such transactions between husband and wife.

The MEMBER (Judge ADAMS). I understand what you advised him was that three things would be looked to, the marke price, the ability

of the purchaser to pay for it, if it was bought on credit—was that one of them?

The WITNESS. The financial ability or responsibility. I do not understand that it would invalidate a sale because the purchaser did not happen to pay cash.

496 The MEMBER (Judge ADAMS). I understand that, but I want to get at what you were advising.

The WITNESS. The third element was the absolute sale.

The MEMBER (Judge ADAMS). That is all.

The MEMBER (Judge LANSDON). Your first element in a transaction of this kind is there shall be an actual sale, isn't it?

The WITNESS. Yes.

The MEMBER (Judge LANSDON). That if it is to be used for tax purposes in the first instance, there must be an actual sale.

The WITNESS. Yes.

The MEMBER (Judge LANSDON). And it has got to be made outside of these restrictions and limitations put on by the law for tax purposes.

The WITNESS. Yes.

The MEMBER (Judge LANSDON). Is that what you advised Mr. Mitchell?

The WITNESS. I do not think I told him that in so many words, but it was the substance of the advice, he had to make an absolute sale and the sale must be made at the market value of the property, and the wife financially responsible.

The MEMBER (Judge ADAMS). Any further examination evoked by these questions?

Mr. WALLACE. Not from me.

(Petitioner's Exhibit 57 offered and received in evidence.)

497 Thereupon, GUY CARY, was called as a witness by and on behalf of the petitioner, and having been first duly sworn was examined and testified as follows:

Direct examination by Mr. MOORE:

Q. Mr. Cary, you are a member of the bar of the State of New York? A. I am.

Q. How long have you been a member? A. For about 29 years.

Q. Where did you receive your legal education? A. At the Harvard Law School.

Q. And before that you went to Yale University? A. No, I went to Harvard University.

Q. After your graduation from Law School, where did you commence your practice? A. In the City of New York.

Q. With what firm? A. With my father's firm.

Q. And how long did you continue with that firm? A. Well, until his health failed, and I had practiced in the firm of my own until I became a member of the firm of Shearman & Sterling in January of 1919.

Q. And you have been a member of that firm ever since? A. Yes.

Q. When did you first become counsel for The National City Bank? A. Well, I do not think I became counsel for The National City Bank at any time as distinguished from my firm.

Q. Let me put it this way, when you came with the firm of Sherman & Sterling, in 1919, did you immediately interest yourself to a great extent in the problems of the firm's client, The National
498 City Bank? A. I began to relieve my senior partner, Mr. Garver in a good many matters in that connection as his years advanced and my experience increased, and I took over more and more that end of the firm's work.

Q. And to an increasing degree you have concerned yourself with the Bank's legal problems ever since, have you not? A. Yes.

Q. When did you first meet Mr. Mitchell? A. When I joined the firm in 1919.

Q. And at that time he was President of The National City Company? A. Yes.

Q. An affiliate of the bank? A. Yes.

Q. Did you have occasion, and have you had occasion over the period from 1919 to 1933 to discuss various legal problems with him? A. I have discussed a great many of the bank's legal problems with him over that whole period.

Q. Is it fair to say you probably talked to him most every working day when you and he were in New York City at the same time? A. Well, I think you would have to work that on an average because there would be some series of days when I might not see Mr. Mitchell at all, he being engaged with his matters and I with mine, and at other times we would frequently meet two or three times a day.

Q. Did there ever elapse a period of a month or more during the time when you were both in the city when you did not discuss a legal problem of some sort? A. No, I should say not.

Q. And in that connection, did you become acquainted with his personal affairs, and advise him on his personal legal problems? A. Very little. I did handle from time to time some matters of personal business for him.

499 Q. I understand that you have no part in and knew nothing about the sale to Mrs. Mitchell of the 18,300 shares in December 1929. A. That is correct, I had no part in it, and to the best of my recollection I knew nothing about it until more than a year afterwards.

Q. When would you place your first knowledge of the sale? A. I should say in January or February of 1931.

Q. Will you tell the Board the circumstances surrounding your first knowledge of it? A. To the best of my recollection, Mr. Mitchell told me about the sale, or told me he had sold a large amount of stock of the bank to Mrs. Mitchell in January 1931, in connection with a new will which he asked me to draw. That was the first I recall hearing of the transaction.

Q. Did he say anything about any agreement, or any intention to repurchase at that time? A. Not a thing.

Q. Shortly after January 1931, did you have occasion to draw some mortgages for Mr. Mitchell? A. I did.

Q. What conversation did you have with him at that time? A. That took place in the following month, in February, I cannot fix the precise date, but it was in that month of February 1931. Mr. Mitchell saw me at that time and told me that he had reached the limit of his ability to continue to put up collateral for the loan he had with J. P. Morgan & Company, and he was considerably distressed in having to reveal that situation to that firm, and said that the only additional collateral he had to offer would consist of mortgages on his real estate. He asked me if I would prepare those mortgages in case they should prove acceptable to that firm to take them.
500 I told him I would, and further told him the sooner he discussed that matter with them frankly, the better it would be for all concerned.

Q. After that conversation, did you ever find out whether he had acted upon your suggestion or not? A. Not many days afterwards, he told me he had discussed the situation with one or more of the partners of that firm, and had agreed to give them mortgages on his house in New York, his place at Tuxedo, and his house at South Hampton, Long Island, and he asked me at that time to prepare those mortgages, and soon after that, as soon as I obtained the title papers, I had them drawn in the office.

Q. And delivered to him? A. They were delivered to him for execution, and then my recollection is he brought them back to me, or at any rate they came back to me for I delivered them to one of the partners of that firm myself.

Q. And that was approximately the early part of March 1931? A. My recollection is the receipt which I took for those mortgages was dated the 5th of March 1931.

Q. Now, after March 1931, did you have any other occasion to discuss Mr. Mitchell's personal affairs with him, and particularly his own personal financial situation, and his position and relations with Morgan & Company and the loan? A. I had a conversation with him about his personal affairs in the fall of that year by which I mean some time in November of 1931.

Q. Will you give us that conversation? A. I cannot give you the conversation, but I can give you the substance of it. Perhaps I might remind you that things were going from bad to worse during
501 that period. England had just gone off the Gold Standard and the markets were extremely depressed, and going down all the time, and Mr. Mitchell exhibited the greatest possible distress of mind about his own financial situation. He said that among other things one of the circumstances that gave him the greatest possible concern was the financial situation in which Mrs. Mitchell had been placed by the purchase which she had made from him of this large block of stock. He said he had not only by his action which he had

taken on October 29th, in coming to the rescue of the institution, depressed his own personal fortune perhaps beyond the possibility of retrieving it, but by an action which had been well intended, and which he thought that would protect her and result in profit to her, he had probably succeeded in involving her beyond repair, involving her fortune beyond repair and he really said he saw no outlook to the situation.

I think I have summarized the conversation. He did not refer particularly to the loan with Morgan & Company as far as I now recall except to tell me what I really hardly needed to be told, that the situation was made worse even then better since I had heard of it first the early part of the year.

Q. Did you offer him any advice on the subject he was discussing with you at that time? A. The only advice I gave him at that time was he badly needed the advice of some experienced lawyer who could consider his own affairs from his own angle exclusively. That it was impossible for me as a member of my firm, and director of the bank, impossible for my firm as counsel for The National
502 City Bank, to advise him personally in relation to the situation as he should be advised, and that I thought his ought to consult someone of experience.

Q. Did you make any recommendation to him at that time? A. No; I made no recommendation, Mr. Moore. My recollection is Mr. Mitchell said that he thought I was right about it, and then after some reflection, he remarked that Mr. Paul D. Cravath was an old friend, and he thought he would be willing to counsel him.

Q. Did you ever hear after that that he did confer with Mr. Cravath?

Mr. DEWEY. Excuse me, I now think I should move to strike out all evidence as to this conversation which occurred in the month of November 1931, since there is no evidence I now submit that any advice was given, or any advice that was given concerning the matter before this Board is a self-serving declaration which has no relevancy of any kind whatsoever. I think that the entire conversation should be stricken, and I so move.

Mr. MOORE. The Government has seen fit to introduce evidence of the repurchase in March 1932. This is the first of a series of events which lead up directly to that repurchase, and in the light of the fact that the so-called repurchase cannot possibly be understood unless this conversation is in the record and before the Board, I think it is competent.

Mr. DEWEY. I should make no objection to the advice of counsel as to a repurchase. There is not a hint or suggestion of advice
503 in this conversation, and it is my understanding as the testimony now stands, the witness has testified specifically that he gave no advice in this conversation, and upon that basis I move that the entire conversation be stricken from the record.

Mr. MOORE. These events which were unforeseen at the time of the original purchase had created a different situation in his own finan-

cial affairs and in his own state of mind, and he was seeking the advice of his attorney.

Mr. DEWEY. I submit that telling a man he had better get a lawyer is not legal advice. That is all it amounted to.

Mr. MOORE. If the lawyer is a party, it is very legal advice.

Mr. WALLACE. If the Board will indulge me, it becomes very important for us to know why Mr. Mitchell went to Mr. Cravath. Any sort of inference may be drawn from it, if we do not know the circumstances under which he went. It might be even suggested that he went in order to arrange something, he could not arrange with somebody who was familiar with this matter. This was matter introduced over objection, the matter of this so-called repurchase, and there is also this claim against The National City Bank which began at the very time in the fall of 1931, and moved forward until the claim was made by letter of the 5th of March, from this firm of lawyers, the Cravath firm concerning which we are now offering this proof.

504 Mr. DEWEY. Without attempting to talk too much, as I understand it, no advice was given in this conference concerning the alleged claim. I may be wrong, but I do not recollect any testimony in this conversation about a discussion of the alleged claim. If I am wrong, I know that Mr. Moore would correct me, as to why he went to see Paul D. Cravath, and it seems to me if and when the Government is stupid enough to try to raise an inference that a man trying to counsel with Paul D. Cravath that there is something wrong about it, no such inference has been drawn nor can be drawn, and I am sure that the Board would draw no such inference.

The MEMBER (Judge ADAMS). I have listened attentively to the testimony. It has no relation to any matter concerning the repurchase so far as it has been testified to by the witness. It all relates to a statement made by the petitioner to this witness, which statement is clear enough, and it is all self-serving, a statement made many months after the transaction involved in the transfer of this stock to Mrs. Mitchell.

The fact that Mr. Mitchell went to Mr. Cravath upon the suggestion of his friend and counsel will remain in the record. The other portion of the statement will be stricken from the record upon the objection.

Mr. MOORE. Exception.

The MEMBER (Judge ADAMS). You may have the exception.

505 By Mr. MOORE:

Q. Mr. Cary, after you told Mr. Mitchell, or after Mr. Mitchell told you he had gone to Paul D. Cravath for advice, did you ever meet with Mr. Cravath and Mr. Mitchell? A. Yes.

Q. Was anyone else present? A. Mr. Cravath's partner, Mr. Robert T. Swaine was present.

Q. And did you and Mr. Mitchell and Mr. Cravath and Mr. Swaine discuss the matters you have just now narrated? A. I answered a number of questions which Mr. Cravath and Mr. Swaine asked me

about the events of the past, and discussed with them various phases of it.

Q. Was the sale of the 18,300 shares to Mrs. Mitchell in December 1929, mentioned? A. Yes.

Q. What was said in connection with that transaction? A. It was mentioned as I recall as a part of the history as to what Mr. Mitchell had himself done in October 1929, and I do not recall as to why that particular transaction was introduced except as a fact to be related in connection with other facts.

I recall pointing out to those gentlemen that it was a sale of that stock to Mrs. Mitchell at a price, and it had a distinct bearing upon any claim Mr. Mitchell might advance against The National City Company to be held harmless from loss in the establishment of the credit for the benefit of that company with Morgan & Company back in October 1929.

Q. When you say what Mr. Mitchell had done in October 1929, are you referring to the acquisition of the 28,300 shares in October 1929? A. I was referring to the outcome of the establishment of that credit which resulted in the acquisition of that amount of stock.

506 Q. After you had had that first discussion with Mr. Cravath and Mr. Swaine, did they undertake so far as you know, to advise with Mr. Mitchell on the subject of his personal affairs? A. I was not present at any interview with those gentlemen at which Mr. Mitchell was present, so I cannot answer for what conversation they may have had with him, but I know that from what he told me, that during the next few months they were actively engaged in going over his affairs.

Q. Did you talk with Mr. Mitchell in the early part of 1932 about his personal affairs? A. Not prior to the period that we have discussed, and—I should say not prior to this interview with Mr. Mitchell which I have related in some detail.

Q. Fixing the date of March 24th, 1932, as the date of the repurchase letters, did you talk to Mr. Mitchell about his stock purchase and Mrs. Mitchell's purchase prior to that time in the year 1932? A. Yes; that is the conversation I have just testified to, and that must have taken place—let's see, that conversation I testified to took place in November 1931.

Q. I understood you to say, or I understood that you have just told us of your conversation with Mr. Cravath and Mr. Swaine some time in November 1931, and I am now asking the substance of the conversation you had with Mr. Mitchell in 1932, but prior to March 24th. A. I did. I had another conversation with Mr. Mitchell in March, prior to that date.

Q. Were there others present? A. No; just Mr. Mitchell and myself were present.

Q. Do you recall then what took place? A. To the best of
507 my recollection, it took place as we were walking through the main lobby of the bank going back toward the part where his

office was, and where an elevator would take me up to the upper floor where my office was.

Q. Will you give the substance, as best you can, of that conversation? A. I asked Mr. Mitchell whether he knew, or whether Mr. Swaine was giving any consideration, in connection with Mr. Mitchell's affairs, to the probability that the Revenue Bill, which was then under discussion in Congress, would re-enact a gift tax. He asked me what possible bearing that could have on his affairs, and I said that it had seemed to me from what he had told me of Mrs. Mitchell's situation, that she would soon be at the end of her financial ability, if she had not already reached that point, and that if he ever then said to her, "you cannot pay me any more, and I am not going to demand any more of you," or if Morgan & Company, who held this stock, sold it out and left her without any stock and owing a large debt which he then should forgive, that as I understood it, there would be another complication in connection with his affairs, and that the law might consider that a taxable gift had taken place.

I said I was no expert on the matter, but I thought it was something his counsel should consider.

Q. At the time you said that to Mr. Mitchell, Mr. Cary, were you mindful of the personal financial situation to some degree of both Mr. and Mrs. Mitchell? A. Yes, sir.

Q. Did Mr. Mitchell say anything to you after you had made that statement? A. He could not understand at all what I was referring to. It meant nothing to him as a layman.

508 Mr. DEWEY. I object to the answer and ask that it be excluded.

The MEMBER (Judge ADAMS). The motion will be sustained. The witness states a conclusion. He should state the facts upon which he bases that conclusion.

By Mr. MOORE:

Q. Did Mr. Mitchell say he did not understand the situation? A. Well, that is just what he did say. He said what I was saying did not mean anything to him. He could not see how possibly there could be any gift in connection with his affairs, and he said it must be a legal question, and he said, "will you not please mention it to Swaine, so if it requires any consideration, he will get it," and I said I would.

Q. And did you? A. I did within a few days after that.

Q. When next did you learn that Mr. Mitchell had in any way repurchased the 18,300 shares from Mrs. Mitchell? A. Mr. Mitchell himself told me he had repurchased the stock. I cannot give you the date of that, but it was within a very few days after the 24th of March.

Q. Did he tell you the papers had been drafted by the Cravath office?

Mr. DEWEY. I object to the question, and I move that the last answer be stricken from the record, as having no relevancy, whether

Mr. Mitchell told Mr. Cary after March 24th he had repurchased the stock.

The MEMBER (Judge ADAMS). The objection will be sustained.

509 By Mr. MOORE:

Q. Mr. Cary, your law office may be well called one of the largest offices in New York City, can it not? A. Well, I do not know about that. It is too large.

Q. How many members would you say you have on your professional staff? A. It is a long time since I counted up; I should say over forty.

Q. And the work is pretty well divided up into different channels, is it not? A. It is. It works out that way, though we try not to have too many people specialists.

Q. But of necessity it often happens that certain partners are carrying on work which other partners are not familiar with? A. Yes.

Q. A large portion of your staff may be said to be engaged in the legal affairs of The National City Bank, and The National City Company, and related matters? A. Well, I would not say a large portion, but we have a definite staff that attends to the business of those clients, and then the senior partners and the senior assistants are called in from time to time as the occasions require.

Q. Whenever The National City Bank's annual shareholders' meeting takes place, you make it a habit, do you not, to attend? A. I always attend; yes.

Q. Do any of the other members of your firm also attend? A. Well, I think I am the only one who makes it a habit to attend, for I do so as counsel.

Q. Fixing the date as the first shareholders' meeting after the stock market crash of 1929, will you give us the approximate
510 date of when that meeting took place? A. Well, the Bank holds their meeting on the second Tuesday of January of each year.

Q. Now, whatever date that works out to be, that was the date in 1930? A. That was unquestionably the date.

Q. Did you attend that meeting? A. Yes, sir.

Q. Who presided at the meeting? A. Mr. Mitchell.

Q. How far away from Mr. Mitchell would you say your particular location was at that time? A. Three feet—or four feet.

Q. Both of you on the platform? A. He sat or stood behind a table, and I sat at one end of the table, and the cashier who acted as Secretary, at the other end.

Q. Who was Secretary? A. Mr. L. C. Lenfesty.

Q. Were others sitting with you at the table? A. No.

Q. Where was the meeting held? A. The meeting was held in the Board Room of the Bank, which really was not adequate for the purpose, and when I say no one else was sitting with us, the ladies and gentlemen were crowded all around the room.

Q. About how many persons would you say were present? A. Some 250.

Q. For comparative purposes, in relation to the size of that room with the size of this room, what would be the comparison? A. This would be somewhat the larger of the two. They compare very closely.

Q. Do you recall any shareholder making any inquiry of Mr. Mitchell concerning whether he had bought or disposed of
511 National City Bank stock, or what his attitude was at that time toward National City Bank stock? A. I recall a shareholder, a Mr. Summers asking a question of Mr. Mitchell toward the close of the period which was given to a discussion of the Chairman's Annual Report.

Q. Do you recall what Mr. Summers, or any other shareholder said in substance? A. He asked some questions which I can only give in substance, for I do not recollect his precise words, but my recollection is he wanted to know whether Mr. Mitchell was selling stock. I mean, of course, stock in the bank.

Q. Do you recall what Mr. Mitchell said, if anything? A. My recollection is he said he was not a seller of stock, or words to that effect. I again could not undertake to give you his precise words, as I paid not a great deal of attention to them at the time.

Q. Did any other shareholder ask if Mr. Mitchell was buying stock? A. Well, another shareholder asked Mr. Mitchell another question—I don't think it was whether Mr. Mitchell was buying stock, but the question was designed to ask him whether the stock was a good thing to buy. In other words, the question was designed to find out whether at that price the stock was a good thing to buy.

Q. Can you recall whether any response was made to that question by Mr. Mitchell? A. He made some response to that question, which was in a semi-jocose vein, for a general laugh followed, and that closed that incident, and discussions passed on to other subjects. As nearly as I recall, the substance of his reply was something to
512 the effect that if one had the money to buy it or something like that, he thought it was a good stock to buy.

Q. And that is the reason it sounded rather funny on that occasion, not very many persons did have money at that time to buy? A. Well, I would not like to pass on that, but this was very soon after the crash.

Mr. Moore. The respondent may inquire.

Cross examination by Mr. Dewey:

Q. In that conversation or in any conversation which you ever had with Mr. Mitchell, Mr. Cary, between December 20th, 1929, and March 24th, 1932, did he ever tell you about gifts he was making to Mrs. Mitchell in relation to the interest she was paying him on the purchase of the 18,300 shares of National City Bank stock? A. Mr. Mitchell never discussed any matters of detail whatsoever in connection with that transaction during that period.

Q. When you spoke to him in March 1932 about the possibility of his making a gift to her of the debt she owed him, did he tell you

that he had already been making gifts to her in large amounts? A. No; my same answer holds.

Q. On the contrary, what he said to you was, he did not understand what you meant by a gift, isn't that correct? A. Not that, the tax on a gift, but the gift I was trying to get him to see forgiveness of the debt.

Q. I understand, by forgiveness of indebtedness, and he said he did not understand, is that right? A. He did not understand how such a thing might result in a tax.

513 Q. He did not say forgiveness as a banking term, he did not understand? A. No, he did not say that.

Q. Nor did he mention at that time whatever the gifts he had been making to Mrs. Mitchell in connection with the interest payments that she was making? A. No, he never discussed his personal affairs with any such detail at any time.

Q. At any of the times when you discussed with Mr. Mitchell this matter of his problem with reference to the sale of stock to Mrs. Mitchell, did you ever advise him what the effect would be with regard to J. P. Morgan & Company, if he should repurchase that stock at the original sales price? A. I do not think I understand what you mean.

Q. Let me make myself plain. A. I do not think such a subject ever came up.

Q. Did you ever discuss with Mr. Mitchell, or advise him that if he be indebted to J. P. Morgan & Company in the sum of $6,000,000, the forgiveness of an indebtedness of Mrs. Mitchell to him of $3,800,000, relatively that would be a fraud upon J. P. Morgan & Company? A. No, because any suggestion or any thought we had on that subject, or that I had was entirely predicated upon Mrs. Mitchell's financial resources being first entirely exhausted.

Q. Well, you did not know then at these discussions that she had not suffered except on paper any financial loss by reason of this purchase, is that correct? A. I understand she had reached the limit of her ability to make payments on account of that debt.

Q. You mean payments on account of interest or principal?

514 A. Well, I just had no question of distinction in my mind. I knew none of the circumstances or details of that at all.

Q. Did you understand from Mr. Mitchell that she had ever paid a dollar of the principal? A. I never heard the subject discussed.

Q. At what time did you learn or understand from Mr. Mitchell that Mrs. Mitchell's capacity to pay had then been exhausted? A. Well, I should say I understood that first in the Fall of 1931. I do not think I understood the situation was as bad as that at the time. I had a previous conversation with him at the time of drawing his will in January of the same year.

Q. January of 1931? A. Yes.

Q. What was your understanding in January 1931? A. Merely that he had sold her this stock; that she had bought the stock and there was a large liability from her to him on the stock, and that he

was very anxious about it, and so was she, and she hoped very much things would turn for the better soon.

Q. That is not the question I thought I asked you. I asked what was your understanding in January of 1931 with regard to the status of Mrs. Mitchell's financial affairs with relation to this specific transaction? A. I have no information on that at all, Mr. Dewey.

Q. You do not know that in January 1931, if this was a real sale, Mrs. Mitchell was then insolvent by probably about $1,000,000? A. I had absolutely no figures to go at all.

Q. You did not know that a 50-point drop on this stock from 212 would wipe out Mrs. Mitchell's entire resources? A. I did not know what her resources were.

515 Q. At the conference in the Cravath office, you advised that the figure of 212, the sales price to Mrs. Mitchell, would limit the proper amount of Mr. Mitchell's possible claim to the National City Company? A. I was speaking as counsel for the company and I pointed out to Mr. Mitchell's counsel that would certainly be contended by the company.

Q. What was the subject matter of that conference, if I may ask? A. We will put it this way, Mr. Mitchell said to me that Mr. Cravath would like to talk to me, and he asked me some questions about some of these events dating from the panic time in 1929, that Mr. Mitchell tried to explain to him, and he said they were things that a lawyer——

Q. Excuse me, are you telling what happened at the conference? A. No, I am telling you——

Q. My question was, what was the subject matter of the conference? A. I am trying to give it to you. The subject matter was to ask me questions which I, as a lawyer, could answer.

Q. With reference to what? A. With reference to the history since 1929.

Q. Of what? A. In the first place, Mr. Mitchell's action in establishing the credit with J. P. Morgan & Company for the benefit of the National City Company, and the history of how that worked out over the intervening period.

Q. Well, what knowledge did you have of that matter that Mr. Mitchell did not have himself, Mr. Cary? A. Well, I do not know that I did have any knowledge on that point that Mr. Mitchell would not have, but I did have a lawyer's point of view about some of those things.

516 Q. Excuse me, Mr. Cary, I am trying to find out what you were called into that conference for. Now, you were not consulted at the time the Morgan credit was established, were you? A. No.

Q. And it never became a matter upon which you gave advice to Mr. Mitchell? A. No.

Q. And you were not consulted at the time he bought that stock on October 29, 1929, were you? A. No, sir.

Q. And had that ever been the subject of advice given by you for the purpose of action by Mr. Mitchell prior to that? A. No.

Q. Will you tell me what it was you knew that required your presence or rather, to put it in proper form, what it was you were asked at that conference, and what opinion or facts you contributed to that conference? A. Well, I remember one thing, Mr. Cravath and Mr. Swaine wanted to know whether Mr. Mitchell had ever presented to the Board of Directors of The National City Company a claim that he was entitled to be indemnified against any loss that he might incur in connection with the establishment of that credit.

Q. You mean with Mr. Mitchell sitting there, he asked you? A. I mean exactly that.

Q. And you are not a Director of The National City Company, are you? A. No, I was not a Director of The National City Company.

Q. Do you know why you were asked that by Mr. Mitchell's counsel, with Mr. Mitchell there? A. Well, I had naturally a general knowledge of those things. I was able to answer the question.

Q. The simple answer was no? A. No, there was another and simpler answer, that my partner, Mr. Winston, at that period
517 had not yet gotten back from a trip to Chile and he possibly might have gone in my place had he been here.

Q. The fact is the answer was, no such claim had been presented so far that you knew? A. No such claim had been presented.

Q. Mr. Mitchell knew that better than you, being Chairman of both institutions?

Mr. Moore. That question is argumentary.

A. I am not going to put myself in Mr. Mitchell's place.

Q. What else was discussed at this conference? A. The subject of discussion proper was whether there was a proper basis for a claim for reimbursement, and if not reimbursement, for indemnification growing out of the circumstances dating back to August of 1929.

Q. In other words, see if this is correct, this was a conference at which you as counsel to The National City Bank and National City Company were counseling with the personal counsel for Mr. Mitchell on the question of whether the two counsel believed or could consider there was a claim by Mr. Mitchell arising out of the purchase of this stock? A. I told you that I told them they ought to know certain facts which seemed to me to have a legal bearing upon the aspects of the case, and starting with the premise that what Mr. Mitchell had done had been for the institution, I pointed out nevertheless, that a claim for indemnification had not been made to the Board of Directors at the time, or since then, and that two fiscal periods or years had closed without such a claim being pre-
518 sented, and those were serious legal barriers to such a claim, as they could well appreciate, and furthermore, a large part of the stock, namely, the 18,300 shares had been sold at a price that would work in law, as I understand, as a limitation of the loss.

Q. Was Mr. Mitchell present at the time you gave that advice, or made that statement? A. That was not advice.

Q. Well, opinion, if I may say that? A. I was not undertaking to advise Mr. Cravath how to advise his own client.

Q. I changed it to opinion. A. I would rather say it this way, I was giving the facts as I understood them.

Q. My question was, was Mr. Mitchell present at that conference? A. Yes, he went there with me. I am not sure whether he remained all through the entire conference, but he was there quite a time anyway.

Q. Well, anyway, you did make the statement at the conference, and now after that statement, did you ever see the letters prepared by Mr. Cravath's firm, presented by Mr. Baker at Mr. Mitchell's request? A. Yes, I received them from Mr. Baker.

Q. And I take it the conference at which you said the price of 212 would, in your judgment as counsel for The National City Bank, stop any claim, was prior to March 5, 1932, when this letter was drawn? A. The conference was back in November 1931.

Q. Have you seen the last paragraph of that letter, Mr. Cary, which reads, "we are, therefore, of opinion that The National City Bank is under obligation to take up from Morgan the
519 18,300 shares of National City Bank stock at the net present cost with adjustment for interest charge and the dividends received." A. I saw that paragraph the last time I had the opinion in my hand, which was quite a long time ago.

Q. When the matter came up to the Board of Directors, you saw the letter? A. I saw it in March 1932, and I saw it subsequently when you showed it to me in 1933.

Q. Did you, when you first saw this letter, speak to Mr. Mitchell about the matter of his asking The National City Company to take up stock belonging to Mrs. Mitchell? A. No; I never frankly understood the reasoning that underlay that final paragraph in that opinion. I think once before I made that same statement.

Mr. DEWEY. I had forgotten. Your memory is better than mine. That is all, thank you.

The MEMBER (Judge ADAMS). Any further questions?

Mr. MOORE. That is all.

(Witness excused.)

Whereupon, GARRARD WINSTON was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. MOORE:

Q. Mr. Winston, you are a member of the Bar of the State of New York? A. I am.

Q. How long have you been a member of that Bar? A. Since 1927.

520 Q. Prior to that time were you admitted as an attorney in any other state? A. I was a member of the Bar of the State of Illinois.

Q. Where did you receive your legal education? A. I was graduated, B. A., Yale University, and had one year of law at Yale and

took the other two years at Northwestern University and received the degree of Bachelor of Law there.

Q. You started your practice in Chicago after your graduation? A. Yes.

Q. With what firm? A. Winston, Strong & Shaw.

Q. For how many years were you a member of the firm of Winston, Strong & Shaw? A. Except during the war, I was a member of that firm until 1923.

Q. And what activities did you engage in in 1923? A. I came to Washington as Under-Secretary of the Treasury.

Q. How long did you remain in Washington in that capacity? A. Until 1927.

Q. When you went to New York and became connected with the National City Company? A. That is correct.

Q. You became a director, did you not, in 1927, of that company? A. I did.

Q. And shortly thereafter became one of the senior members of the firm of Shearman & Sterling? A. Yes.

Q. And since then have remained a member of that firm? A. Yes.

Q. And are a partner of Guy Cary and Harry Forbes, who have testified before you here? A. Yes.

521 Q. When you came to the National City Company in 1927, will you state in a brief and general way what you did to familiarize yourself with the activities of that company? A. I went back over what they had been doing in the past from a business standpoint. I went back over their management and method of compensation to the management, and I familiarized myself with the activities in buying and selling securities.

Q. And in connection with the management you found they had a plan in operation for compensation to their employees, referred to as the management fund, did you not? A. That applied to the executive officers of the company.

Q. Did you go back and read the resolutions creating the management fund of the National City Company? A. I did.

Q. And became familiar with the scheme as set up in the resolution of February 8, 1921, which, I think it is conceded, initiated the fund? A. I was more familiar with the existing resolution, which was of 1927.

Q. Is it a correct statement that the resolution of 1927 was the main resolution under which the management fund was operated during the year 1929? A. The 1927 resolution was the one under which the management fund operated.

Q. And that, in turn, had been adopted, or largely fashioned upon the original resolution of February 1921? A. It was an elaboration of the 1921 resolution.

Q. In addition to referring to the resolutions did you also acquaint yourself with the manner in which payments had been made out of the management fund since its inception in 1921? A. I did.

522 Q. What did you find? A. Do you mean the method in which it was applied?

Q. First let me ask you as to the period of the distributions. A. The management fund itself was an annual arrangement. Payments were made in the form of an advance payment in the middle of the year and a final payment at the end of each year.

Q. You say distributions were made semi-annually, Mr. Winston? A. They had been since the fund was in existence, in 1921.

Q. Had distributions been made semi-annually in each of the years between 1921 and 1929, to your knowledge? A. My examination of the records showed that they had.

Q. And had further distributions been made at the end of each of the years? A. Yes, sir.

Q. In other words, there had been no semi-annual period in which payments in the employment fund had not been made? A. From my examination of the record, that appears to be correct.

Q. Did you also learn the size of the management fund distributions in July and January? A. I did, after I came into the company. I did not go back into it prior to my connection with the company.

Q. Did you learn whether they were meager or of substantial amount? A. Quite substantial in amount.

Q. Do you recall the directors' meeting of the City Company of June 25, 1929? A. I do not remember whether I was at that meeting, but I had gone over the records. I think I was at the subsequent meeting in which the minutes of June 30th were read.

523 Q. Did you learn in the middle of the year 1929 a distribution had been made from the management fund? A. I did.

Q. And in the amount stated in the minutes of $1,860,000? A. That is correct.

Q. Referring briefly to the manner in which the management fund was carried on—I think I can shorten this by a few leading questions, to which I am sure there will be no objection—I understand the fund was calculated on a monthly basis? A. It was accrued monthly. I presume that means calculated.

Q. By accrued monthly, you mean computations were made on the basis of monthly earnings, according to the scheme set up in the management fund, 8 per cent being taken off capital surplus and undivided profits and after that and certain other deductions, 20 per cent computed and placed, tentatively, in a management fund? A. It was accrued from the first of the year on a monthly basis, as I remember the figures.

Q. That is, for illustration, if any one month in your calculation showed $1,000,000 was accruable to the management fund, the books showed $1,000,000 in the fund, and if in the next month another $1,000,000 were shown applicable to the fund, your books at the end of the second month would show $2,000,000 in the management fund? A. That is correct.

Q. And in the third month, if you had a loss of $500,000, that would be deducted from the profit made, so that at the end of the third month the fund would show $1,500,000? A. That is correct.

Q. Do you recall whether you knew what amount had been
524 accrued in the management fund in June 1929? A. Each month the accruals were reported to the Board, and at that period I think there was accrued about $2,700,000 or $2,800,000.

Q. Was it your custom in the management fund to pay out all of the accruals in the mid-year distributions, or just a portion? A. It was not the custom to pay them all out. I think, roughly, it was about two-thirds paid out.

Q. Leaving the balance to be paid out at the end of the year? A. Leaving the balance still in the fund to be disposed of at the end of the year.

Q. Do you know whether there were subsequent accruals to the management fund after June 1929? A. It was so reported each month.

Q. Did you learn at some subsequent time that the loss which the company sustained had adversely affected the management fund? A. I did.

Q. When did you first learn that? A. I was away most of the month of November and I do not believe I learned of the effect on the management fund until the end of December.

Q. When you say you were away, does that refer to your Indianapolis trip that Mr. Forbes mentioned yesterday? A. That is correct.

Q. How long were you in Indianapolis on that occasion? A. Something over three weeks, I think.

Q. Can you place with any accuracy the time you returned to New York? A. I know I returned on the second Monday in December, which, I think, was the 13th. Yes, it was.

Q. After you returned to New York, were you occupied with business duties in the office, or were you out of town for any
525 portion of the time? A. I was both in the office and was also down to Washington two or three times during that period.

Q. So that in the period between the 13th you had several trips to Washington, plus the Christmas Holidays intervening? A. I include those; I came down here for Christmas.

Q. Did you talk to Mr. Forbes at all in the month of December after your return from Indiana? A. I do not believe I did. I did not talk to Mr. Forbes until after the December 30th directors' meeting.

Q. Is it a fact that in a firm of your size it is not unusual for substantial periods of time to pass without one partner seeing the other? A. That is quite correct. I seldom see my senior partners, excepting going home together.

Q. Each of you has specialized work in relation to legal activities and clients that does not cause you to get together during the day? A. That is correct.

Q. Did you talk to any one of your firm or any one in the company concerning the management fund, or taking care of the mid-year distribution between the time of your return from Indianapolis and

the meeting of the Board of Directors of December 30, 1929? A. I did not.

Q. And that, of course, includes Mr. Mitchell? A. That is right.

Q. You feel quite sure during that period of time Mr. Mitchell did not tell you he had made certain arrangements in connection with the management fund that he wanted to be put through at the meeting? A. The first I heard of any question in regard to that
526 was on December 30th. Whether it was at the meeting or just prior to the meeting, I am not quite sure.

Q. The meeting of December 30th was what is known as the year end meeting of the National City Company, was it not? A. Yes, sir.

Q. And that was a meeting which summarized all of the matters to be taken up in the City Company prior to the closing of the books? A. That is the most important meeting the company has, and, of course, in 1929, it was much more important than in other years.

Q. Your particular activity in the firm of Shearman & Sterling, Mr. Winston, was really to be the legal advisor of the National City Company, was it not? A. I was consulted on the broader questions of legal policy with the City Company, but my partners and others handled a great deal of the detail in connection with the flotation of securities and matters of that kind.

Q. You were also a director of the City Company? A. I was.

Q. Referring to the meeting of December 30, 1929, with particular reference to everything which you can remember said at that meeting pertaining to the management fund—let me first ask you if you recall being present with Messrs. Mitchell, Swenson, Winthrop, Perkins, Rentschler, Winston, and Stillman? A. I do not recall each of them individually. I know it was a full meeting.

Q. Will you tell us in substance what you recall as being said concerning the management fund for the year 1929? A. Well, in substance, Mr. Mitchell brought up the fact that under the calcu-
527 lation of the management fund, the losses of the last two months had offset any profits made in the earlier eight or nine months, and that the fund, instead of being in the black, was in the red; that is, the payment in June had more than exhausted the total amount available for distribution in the fund. He said some adjustment of this matter had to be made; that the money was owing to the fund, in his opinion, but that some of the officers did not have funds, cash at hand, sufficient to repay the amount they had received in June, and some of the officers had claimed that they were not legally required to repay the June advance, and that this matter had been discussed with the officers and that they were willing to sign an obligation to repay the June advance out of any subsequent accruals to the management fund. Mr. Mitchell stated, as I recall it, that seemed to be about the only practical solution of the problem. There was some discussion, I do not recall just by whom, and it was finally agreed by the Board that that seemed to be the only way out of the difficulty, and a resolution in substance was adopted to the effect that the amount paid in June should be considered as an advance repay-

able out of subsequent additions to the management fund, and I was authorized to draw a formal resolution to effect that purpose.

Q. Mr. Winston, as a matter of corporate practice, and particularly in connection with your activities as counsel and director of the National City Company, it frequently happened, did it not, that when some plan was under consideration by the Board, that a resolution, or draft of minutes would be drawn in advance of a meeting and brought to the meeting to be adopted or passed upon?

528 A. That would be the normal practice where you were sure what you were going to do.

Q. That is ordinary corporate procedure, is it not, in the light of your experience as a corporate attorney? A. That is.

Q. Was there any such resolution or draft of minutes on the subject of the treatment of the management fund brought into the meeting of December 30, 1929? A. There was not.

Q. Did you know prior to the meeting of these receipts or papers concerning which Mr. Forbes testified yesterday? A. I did not.

Q. Is it a fair statement you did not know of what attitude the Board of Directors of the National City Company would adopt concerning the management fund before they voted upon the resolution concerning which you have just testified? A. I can testify for myself; I did not know what I would do.

Q. And you were one of the directors who voted upon the matter? A. I was.

Q. Subsequent to the action taken by the Board on December 30, 1929, did you draft a resolution which in your opinion set forth the action which had been taken by the directors at that time with respect to the management fund? A. I did.

Q. I show you a paper which has been marked Respondent's Exhibit DDDD and ask if that is a copy of the paper which you just referred to? A. This appears to be. It is on my——

Q. Have you a recollection of having drawn this resolution subsequent to the meeting of December 30th? A. Yes.

529 Q. Do you recall how long after the meeting you drafted it? A. I should say within a week or ten days.

Q. You will notice a part of the same paper, on the second page, there is the statement "Minutes of meeting of January 9"; I assume that is January 9, 1930? A. That is correct.

Q. Does that help you to place the date, or might that have been drawn also after the meeting of January 9? A. That might have been drawn either after or just before the meeting.

Q. After you prepared your draft of the December 30th resolution, did you show it to Mr. Mitchell? A. I sent it down to Mr. Mitchell.

Q. Was it your habit to send resolutions down to Mr. Mitchell? A. When they were important resolutions, I would send them down to Mr. Mitchell for any criticism that he might have.

Q. Did you have any conversation with Mr. Mitchell after you had sent this resolution down to him? A. I believe I did. I am not

sure whether I talked with him or whether he sent it back with pencil notations on it.

Q. And the only change made from the original of your draft was the scratching out of certain words on the first page? A. That is at a meeting of December 30th——

Q. Can you read through the portion stricken out?

The MEMBER (Judge ADAMS). Is he reading from the Exhibit?

Mr. MOORE. From Exhibit DDDD, your Honor.

530 The WITNESS. It reads, "and all securities in syndicate accounts." That was stricken out in pencil on the first paragraph of the resolution, and also the word "do," in the first line of the paragraph.

By Mr. MOORE:

Q. And those are the only changes which Mr. Mitchell made in this resolution? A. That is correct.

Q. Now, after the first of the year 1930, did you have, in connection with the affairs of the National City Company, any occasion to consider the action taken by the Board of Directors in connection with the management payment of July 1929, and the entire management fund situation during that year? A. Yes.

Q. Will you state the circumstances and what happened, whom you saw and what you said? A. After the resolution was adopted, it occurred to me at once that the question would arise as to how the company would consider this June payment for income tax purposes, and I went to see my partner, Mr. Forbes, who, I was told, had prepared——

Mr. DEWEY. I must object to what occurred to Mr. Winston and what he was told by someone else. I think we should confine the testimony to relevant testimony as to what happened. I move to strike out the entire answer because of those two inadmissible statements.

The MEMBER (Judge ADAMS). I think at the present moment the fact he went to see Mr. Forbes would not be harmful.

531 Mr. DEWEY. I object to what someone else told him.

The MEMBER (Judge ADAMS). I think he may state the things that prompted him to go to see Mr. Forbes.

Proceed with your examination. I will overrule the objection.

Mr. MOORE. I offer this as a step to show that Mr. Winston in turn talked with the petitioner.

The MEMBER (Judge ADAMS). The objection has been overruled. You may proceed.

By Mr. MOORE:

Q. Do you remember the question? A. You asked me what I did?

Q. Yes. A. I saw Mr. Forbes and I asked him if he had considered this matter from a tax standpoint, and he told me he had not, and I asked him if he would look it up and see what the law was with respect to this June payment as it affected the City Company.

Q. When you say considered it, from a tax standpoint, you mean the tax standpoint of whom? A. Of the National City Company.

Q. Did you discuss with Mr. Forbes at that time the tax standpoint of the individual participants in the fund, or of Mr. Mitchell? A. I did not.

Q. Am I correct, it was solely from the standpoint of the National City Company's tax return that you were discussing it with Mr. Forbes the first time you saw him? A. That is right.

532 Q. Will you proceed? A. Mr. Forbes said he would take the matter up, and a few days later he said he had found an I. T. ruling——

Mr. DEWEY. I will object to that, your Honor.

The MEMBER (Judge ADAMS). My ruling is to the effect Mr. Winston may testify that he consulted with Mr. Forbes about this matter, but I do not intend he should relate here for the record what Mr. Forbes told him. My understanding is you propose to show he later had a conference with the petitioner, Mr. Mitchell, in which he gave him certain advice or said certain things to him, perhaps based on the information that he had gotten from Mr. Forbes, which I would consider to be quite legitimate, but I do not intend Mr. Winston might repeat the conversation had between him and Mr. Forbes.

Mr. MOORE. I want your Honor to understand the purpose. When Mr. Winston advised petitioner, I assume that the extent of his advice is material to this proceeding. If Mr. Winston was advised by Mr. Forbes that there was a decision which, in his opinion, was directly in point to support the position taken, I think it is very pertinent on the subject of the necessity and possibly the accuracy of Mr. Winston's advice to the petitioner. In other words, I do not want to show that he, without any thought whatsoever, gave advice, but that he did what a careful and prudent lawyer would do under the circumstances.

533 The MEMBER (Judge ADAMS). I do not think counsel has challenged the honesty of any advice given by Mr. Winston about this matter. I think it might be presumed that a lawyer, such as Mr. Winston, gave his advice with due reflection.

Mr. MOORE. That has always been my opinion, your Honor, and I will proceed on that basis.

The MEMBER (Judge ADAMS). The ruling will be as stated.

By Mr. MOORE:

Q. I understand when you first saw Mr. Forbes and asked him to look up some authorities, you saw him a second time? A. I did.

Q. And discussed the matter with him at that second conference? A. I did.

Q. After that, did you have occasion to see Mr. Mitchell? A. I saw Mr. Mitchell a few days after that.

Q. Now, will you state, with relation to the 1929 management fund, in connection with any advice you may have given him on the subject, that conversation? A. I stated to Mr. Mitchell that Mr. Forbes and I had come to the conclusion that the June payment made out of the

management fund as a result of the action of the Board in the December 30th meeting was not a proper deduction for the City Company to take from its income tax return and that the City Company should not report those payments as payments of compensation to officers.

Q. Did the National City Company in its return for the year 1929 take the sum of $1,860,000 as a deduction? A. I believe it did not.

534 Mr. MOORE. That is all for the present.

The MEMBER (Judge ADAMS). Cross examine.

Cross examination by Mr. DEWEY:

Q. At the time you went to the meeting of December 30th, 1929, had you discussed with anyone, anywhere, the problem of the management fund payment of July 1929? A. As I stated on direct, I am not sure whether Mr. Mitchell may have talked to me first or before the meeting, a few hours before.

Q. On the same day? A. Yes. But I did not discuss it before that day.

Q. When the matter was taken up at the meeting, was it not a well known subject to many of the directors there; it was not a new and unhead of subject? A. No. I think it was a new subject to the directors.

Q. Had not Mr. Mitchell discussed that with many of the directors there? A. I do not know; not to my knowledge.

Q. Did you hear anything about a receipt for the so-called overpayment of July 1929, at that meeting? A. I think it was at that meeting Mr. Mitchell said Mr. Forbes had prepared a receipt to evidence this sort of transaction.

Q. Did you know that receipt had already been signed by some of the officers prior to the meeting of the board? A. I did not.

Q. It is a fact, is it not, that the action of the board was in precise accordance with the contents of the receipt so previously prepared and executed by some of the officers? A. It was.

535 Q. Is it not a fact the subject was introduced at the meeting by the Chairman, Mr. Mitchell? A. That is correct.

Q. Is it not a fact he outlined what he proposed was the way to handle the matter? A. He outlined what he thought was the only practical solution of the matter.

Q. He was not interrupted during that statement of what he believed should be done? A. I do not think so.

Q. And when action was finally taken, it was in precise accordance with his statement, if I may so call it? A. It was in precise accordance with what seemed to him the only practical solution.

Q. In other words, the resolution as drawn reflects the statement made by the petitioner at the opening of the meeting, precisely? A. They do not reflect his statement, but the solution——

Q. I am trying to avoid the characterization as a recommendation.

The WITNESS. They reflect accurately the solution that Mr. Mitchell stated at the meeting he thought was the only practical solution of the problem.

Mr. DEWEY. Yes. At the time of that meeting did any director suggest that if these officers had received money which they were not entitled to, they should pay it back?

The WITNESS. I do not know whether that suggestion was made, but looking at it myself, I felt they should pay it back.

By Mr. DEWEY:

Q. Was it your understanding they were obligated by this
536 arrangement to pay the money back? A. I thought it was a practical solution that would work out.

Q. That does not answer my question Mr. Winston. A. At the time I thought we could collect that money from them, in spite of the receipt.

Q. You mean by that that in December 1929, it was your understanding the officers were unconditionally obligated to pay back the money? A. I felt legally they could be so compelled.

Q. Both before and after the adoption of the resolution of December 30, 1929? A. Yes.

Q. And you felt the resolution of December 30, 1929, did not alter the fact they owed the money and that payment could be compelled by the City Company? A. It sets a basis of payment; that is all the resolution did.

Q. It is your understanding that resolution merely fixed the manner of payment; is that right? A. Well, I would have to look at these things—I have to look at them in a practical manner, from a practical standpoint, and we have to keep this management with the company; they were the people who were running the company——

Q. I do not like to interrupt you, but I do not believe that is in answer to the question which I asked.

The WITNESS. It fixed a manner of payment, which, as a practical matter, was the only payment you could probably enforce.

By Mr. DEWEY:

Q. I still cannot get an answer. Let me put it this way: Was it your understanding at this meeting and until the time you
537 advised that the City Company should not deduct that payment from its income for the year, that the City Company had a legal right to collect that money and enforce its payment by the officers? A. I would not say that I considered it at that time, looking up the law as to whether they could recover or not. I felt when we passed that resolution, as a practical matter that would be the only basis we would enforce the claim.

Q. I am not talking about your intentions or moral obligations. What I want to know is, at the time you gave the advice, in January of 1930, was it your understanding that the officers owed an unconditional legal obligation to repay what they had received in

July of 1929? A. I do not believe at that time I considered it in that detail.

Q. When you considered the tax problem, was not the question of the legal liability to repay that money the only issue before you when you were giving your advice? A. I took that ruling that was in the I. T. and on analogy to that I passed the proposition as to whether the company should deduct this payment in its expenses.

Q. But in considering the question as to whether a man who has received money in the year 1929, or, to put it another way, a man who has paid out money in the year 1929, may or may not deduct that from his income tax return, is not the only question in issue in a case of this kind, at least, whether or not that money is owed back to him as an absolute, enforcible legal debt? A. I do not know. I am not sure of that.

Q. Did you consider any other question prior to giving your advice than the enforcibility of that debt as a legal obligation? A. I
538 considered the ruling of the Internal Revenue Bureau in this particular case that I have mentioned, and under that, obviously, this was not a deduction from the City Company——

Q. Did that not turn on the repayability of the item? A. It may have; I think it probably did.

Q. Then, do we not get right back to the question as to your point of view, and I think I must insist on an answer, Mr. Winston, as to whether your understanding, at the time you gave this advice, as to whether that was a repayable debt, enforcible legally, or not? A. I regret to say I took this ruling on its face without going into an analysis further than that, and I felt that the money was still owing; but I did not go into the cases as to whether it was legally recoverable or not.

Q. I only want to know this: At the time you gave the advice, was it your understanding of the law, not of one particular ruling, but of the law, that the City Company could not deduct this payment if this money was contingently repayable? A. No; that was not my understanding.

Q. Then, is it fair to say it was your understanding of the law at the time you gave this advice that only in the event the money was legally repayable and that was an enforcible obligation, could the City Company treat this as a non-deductible item? A. I cannot try to put myself back into that period. Since there there has been so much discussion of it, it is difficult for me to get my mind back into that date. I think in my discussion with Mr. Forbes at that time we came to the conclusion that this money was still due.

Q. Will you explain what you mean by still due, from a
539 legal standpoint? A. I mean the company could have sued these officers and could have recovered. I am trying to get back to that date. I think it was——

Q. Let me see if I understand you perfectly, and then we can pass the subject. You say it was your understanding of this resolution and of the action of the Board that the officers owed that money

to the City Company unconditionally from a legal standpoint and that the City Company could sue and recover it? A. I think so.

Q. There is no question in your mind about that; is that right? A. I have not now.

Q. The first time you ever discussed this matter of the taxability of this money with the petitioner, Mr. Mitchell, was in January of 1930; is that correct? A. That is right.

Q. Did he say to you anything at that time with reference to his own income taxes or taxability of that item as affecting his income? A. I do not recall any such statement.

Q. Did you say anything to him with reference to the taxability of the item to him? A. I said to him it followed from the fact this was not a deduction from the company it was not income to the individuals.

Q. You mean you gave that advice to Mr. Mitchell in January of 1930? A. That is correct.

Q. Are you clear in your recollection on that subject? A. I believe it was at that time I made that statement to him, because I have made statements of similar effect to other officers of the City Company——

Q. Of course, I am only talking about Mr. Mitchell now,
540 Mr. Winston; do you recall you did advise him definitely as to the taxability of the item to him? A. I believe I made the statement to him that it followed from the fact it was not a deduction of the company it was not income to the individual.

Q. Do you remember testifying in the criminal trial, in answer to the following question——

Mr. MOORE. Where is that?

Mr. DEWEY. Page 1584:

"Did you state to him whether or not that income, whether it should or should not be recorded in his income tax return? A. I do not know whether that specific question was asked me. I know I have stated that to several people who were interested."

Did you so testify? A. I testified to that; yes.

Q. And later:

"I told the defendant, Mr. Mitchell, that Mr. Forbes and I, after consultation, were of the opinion that the disbursements by the company of the management fund in 1929 under the resolution of December 1929, was not a proper deduction from the income of the company and it necessarily followed that the receipt of that amount by the participants in the management fund was not personal income to them."

Do you remember that? A. Yes.

Q. Which of those answers was correct; that you did or did not recollect having given any advice to Mr. Mitchell?

541 Mr. MOORE. We object to that on the ground it assumes a conflict between the answers, and we say there is no conflict.

The MEMBER (Judge ADAMS). I assume under the rule of cross examination, counsel may assume facts to be true that are not, or that do not appear in the record.

Mr. MOORE. Exception.

The WITNESS. I do not think there is any conflict.

By Mr. DEWEY:

Q. I am referring to the question at the top of page 1585:

"I do not know whether that specific question was asked me."

Now, did something refresh your recollection between that answer and the very next one——A. If you will read the question——

Q. Suppose you read the testimony yourself. A. I do not believe that was any conflict. I made both statements.

Q. Is it not a fact in the first answer you said you did not remember whether such advice had been given by you to Mr. Mitchell? A. I said I did not know whether that specific question was asked me. In the next, I said I made certain statements. I did not say they were in answer to a question.

Q. All right. Now, passing along, you remember the meeting of December 30, 1930, do you not? A. December 30, 1930?

Q. Yes. A. I do.

542 Q. You were present at that meeting? A. I would want to look at the minutes to refresh myself on that meeting.

Q. Yes. That meeting, you may remember, was one, was it not, when Mr. Mitchell and you prepared a long memorandum together, or, at least, one of you prepared it and submitted it to the other, to be read at the meeting, in advance of the meeting? A. Was that the resolution of the 28th?

Q. That was prepared in advance of the meeting? A. Yes.

Q. By whom? A. I am not sure whether Mr. Mitchell or I prepared it in the first instance. I think he prepared it in the first instance and then I went over it and then we went over it together.

Q. And the memorandum in that form was read at the meeting by Mr. Mitchell?

Mr. MOORE. I object to the entire line of testimony concerning events after March 15, 1930, as having no bearing on the advice given the petitioner, the petitioner's state of mind, or charges made against the petitioner in connection with the preparation and filing of the return, which was a completed act on March 15, 1930. This reference to something as of December 30, 1930, and any questions asked concerning it are objectionable.

The MEMBER (Judge ADAMS). Overruled.

Mr. MOORE. May I have an exception to the entire line of testimony?

The MEMBER (Judge ADAMS). Yes.

543 The WITNESS. Your question is what?

Mr. DEWEY. I have forgotten. Will you read it, please?

(The question referred to was read aloud by the reporter as above recorded.)

By Mr. DEWEY:

Q. Is that correct? A. I do not know whether Mr. Mitchell read it, or not, but it was read at the meeting.

Q. The minutes, which are in evidence, say:

"The Chairman read to the Board the following memorandum regarding the management fund and officers' salaries."

You would not question the correctness of the minutes on that subject? A. Not at all.

Q. That memorandum was the subject of a conference between you and Mr. Mitchell, was it not? A. Yes.

Q. And after he had prepared the first draft and you had gone over it, did you thereafter confer with him? A. I believe so.

Q. And then it was put in final form, or were there some more drafts? A. I am not sure of that. I think it was in final form.

Q. Now, in preparing that resolution did you notice the following sentence:

"It was therefore considered that for that year the officers had received in mid-year, an advance payment on account of an expected credit in the management fund which failed to develop, and
544 the officers individually, in writing, agreed to accept this construction and the accounts were debited on the books of the company with the advance in mid-year, with the undertanding such debits should be wiped out by and only by credits for which they might become entitled for management fund accruals in the future."

Do you remember that? A. I remember it now; yes.

Q. Was it your understanding at that time that the statement of the obligation of these officers could be wiped out by and only by credits to the management fund in the future, was consistent with the advice you had given with reference to the taxability of that item? A. That word "only," I am not sure why it came into that resolution. I had no intention, in going over that resolution of December 30th, of varying the terms of the resolution of December 1929. I apparently did not have before me the resolution of December 1929, and that resolution, it seems to me, contained that word "only," because as a practical matter that was the only way we were ever going to get that money out of the officers.

Q. How did you know that? A. Because their conditions were getting progressively worse; not all of them, but some of them.

Q. Did you inquire at any directors' meeting whether the officers or any of them could pay this money back? A. I know of several who could not.

Q. I am talking about the others. Were there not several
545 officers of the institution, even at the time of this resolution, December 30, 1930, who had ample means to pay back the money they had received in July 1929? A. Yes; there were several officers.

Q. And was there any discussion at any of these directors' meetings about asking them to pay back the July 1929 distribution? A. There was not.

Q. And did you still, in December of 1930, believe this advance, as it is called, of July 1929, was a legally enforcible obligation due the company of which you were a director? A. I still felt it could

be legally enforced, but I did not see any practical possibility of doing it.

Q. If you felt it was legally enforcible, how is it you allowed this memorandum to read "Such debits should be wiped out by and only by credits to the management fund?" A. I do not know why that word came in there, except——

Q. I believe you testified at the other trial it was an inadvertence; is that your understanding? A. Yes.

Q. Is this also an inadvertence in the same minutes, which reads as follows, in the resolution:

"Further resolved that the payment made to officers out of the management fund accrual in July 1929 shall continue to be considered as an advance made from an expected accrual in the management fund for 1929 which failed to materialize and that amounts so advanced shall be continued as debts owing by the officers to whom such advances were made, payable only, however, from
546 amounts which may be distributed to such officers from future accruals in the management fund account?"

Was that also an inadvertence? A. That is the same idea.

Q. Was it also inadvertent? A. Yes. It followed there. I followed it consistently in the same resolution.

Q. How could those be legally enforcible debts in your understanding, Mr. Winston, if, in the directors' minutes there were recited provisions that the money was repayable only out of a particular fund not then in existence? A. On the basis there was no consideration for waiving those debts.

Q. Is it not a fact there had been divergent views as to whether the money was repayable at all or not? A. I do not think there was any basis for the divergence.

Q. You do not answer my question, Mr. Winston. A. There had been, yes.

Q. Had there not been a belief expressed by the officers that the money was theirs absolutely in July 1929? A. I was told there was some dispute. I do not know who disputed it.

Q. Is it not a fact that dispute was in effect absorbed or compromised in the form of receipts and resolutions which were adopted in December 1929? A. I had never considered it so.

Q. You say you felt the officers should pay back the money they got? A. Yes.

Q. And there were officers who said the money was theirs and they should not sign anything for it? A. I was told there were such officers.

547 Q. There were two absolutely diametrically opposed views as between the directors and officers? A. Correct.

Q. And this resolution was in effect a solution of the diametrically opposed views, adopted by the board of directors and accepted by the officers by signing the receipts, was it not? A. I assume that is the legal conclusion——

Q. Was that not your personal understanding at the time the resolution was adopted? A. No. I did not give much consideration to the question that some officers disputed this. I looked at it in 1930 as a matter of convenience, because many of the officers did not have the cash to repay, and you could not take it from one and not from all. So, the dispute end of it had never been raised to any material degree in my mind in December.

Q. Then, you say it was still, even after this resolution of December 1930, your understanding that was a valid, legally enforcible debt due the company? A. I never considered it that. I still think there was no consideration for agreeing to accept it only out of a special fund.

Q. When this resolution and these minutes of December 30, 1930, were drawn, and the word "only" got in there twice, was it then your understanding it was still an absolute debt? A. I did not consider it from that standpoint at the time. I looked at it from a practical standpoint.

Q. What was your understanding of the situation in the event one of the officers died? A. I had not considered that.

Q. It follows if it was a debt it would be enforcible against his estate?

Mr. MOORE. I object to this line of testimony. There is no
548 proof any officer did die. We could argue hypothetical questions of law for a great length of time, but I do not think we would get anywhere.

The MEMBER (Judge ADAMS). Overruled.

Mr. MOORE. Exception.

The WITNESS. The only time that matter came up was when Mr. Ripley was anxious to have this obligation exempted——

By Mr. DEWEY:

Q. What was said at that time? A. He said he did not want that obligation in his estate, if he should die.

Q. Was his understanding it might be such an obligation, your understanding? A. I did not consider it. I considered what he wanted when he asked for additional compensation.

Q. At the time you gave this advice in January 1930, did you not give consideration to these problems, Mr. Winston? A. No.

Q. You did not give consideration to the character of the situation in the event an officer died or terminated his connection with the company? A. I gave consideration only to the immediate problem, which was, should the company take that as a deduction from its income tax return and should they file information they had made those payments to those particular officers.

Q. On December 30, 1930, you had before the Board the problem of getting more money into the hands of the officers; is that not a fair statement? A. It is a fair statement the officers had set up a
549 scale of living and did not have enough money to continue on that scale, and not being able to cut down the scale promptly, they needed money.

Q. As a result of that, the Board adopted a resolution which had been the subject of previous consideration between you and Mr. Mitchell? A. That is correct.

Q. And that is the resolution which authorized the payment of the sum of $140,000, odd, which had remained in the fund in January of 1929, after the payment which was made in that month; correct? A. That is correct.

Q. At the time that distribution was authorized by the Board, Mr. Winston, did any director suggest that that $140,000 ought to be applied against the so-called debt due for the 1929 July payment? A. There was no such suggestion and it would be contrary to the purpose of the resolution if we had applied it, because the purpose of the resolution was to provide cash for the officers and not just to provide income for the officers and take the money away from them.

Q. You were directors of your company, were you not? A. We were, and I was.

Q. You owed an obligation to your stockholders, did you not? A. And I owed an obligation to the officers and management.

Q. You do not answer my question, Mr. Winston. A. I did.

Q. In paying out the money, did not any director suggest that the people who were getting the $140,000 were indebted to the company in amounts much larger than that by reason of the debt, already a year and a half old? A. No.

Q. There was not a word of suggestion on that subject at the meeting by anyone; is that right? A. No.

550 Q. And was it at that meeting the question about Mr. Weeks arose, or did it arise between that meeting and the next one? A. I do not know what question you refer to.

Q. Mr. Weeks had left the company prior to this meeting, had he not? A. Yes.

Q. And one part of the resolution reads as follows:

"Resolved, that the undisbursed part of the management fund for the year 1929, amounting to $140,936.38, shall be distributed not later than January 2, 1931, to such officers as were eligible for participation at the close of the year 1928 and are still in the employ of the company and distribution thereof to individual officers shall be in the same proportion as the balance of such 1928 fund was distributed and the share of any officer not now eligible shall be distributed in such proportion as may be determined by a special committee consisting of Messrs. Swenson, Winthrop, and Winston."

You remember being on the special committee that determined that problem? A. Yes.

Q. When your special committee of directors met, did anyone suggest that Mr. Weeks, having left the company, was still indebted to it for a large payment in July of 1929? A. No.

Q. As I understand it, your committee agreed you would split Mr. Weeks' portion among the other officers? A. That is correct.

Q. In so doing, did you give any consideration to the fact
551 Mr. Weeks would never again participate in a future management fund, presumably? A. I did not.

Q. You realized, of course, he would not participate in future management funds, he having left the company? A. I do not believe we gave any consideration to that.

Q. Was that subject not discussed? A. Not to my recollection.

Q. And it is a fact that your committee recommended to the Board Mr. Weeks' share of this money be split up among the officers, without applying any of it to his so-called debt arising out of the 1929 distribution? A. That is correct.

Q. And as a matter of fact did that problem receive much consideration from your committee? A. No.

Q. I believe you were appointed on December 30th, and with the new year intervening, the money was actually distributed January 2, 1931; is that so? A. I do not know when it was distributed.

Q. On your committee which considered Mr. Weeks, prior to the distribution, did Mr. Mitchell say what he thought should be done with Mr. Weeks' money? A. I do not recall Mr. Mitchell saying anything more than what the Board did; to leave it to the committee to decide.

Q. Do you remember answering a similar question at the other trial? A. No; I do not.

Q. At page 1641, do you remember these questions and answers given by you:

"Q. Did anybody say anything about Mr. Weeks? A. I think the question was raised at the meeting.

552 "Q. And what was said to you and by whom, if you remember? A. I do not remember just by whom, but the question was whether Weeks should be included in the distribution of the 1928 management fund.

"Q. Did Mr. Mitchell say anything on the subject when that question was raised? A. I think Mr. Mitchell expressed the view he should not be included.

"Q. Did he give any reasons? A. That he was no longer connected with the National City Company in any way."

Do you remember giving those answers to those questions. A. I do not recall those answers, but undoubtedly they are correct.

Q. Then, would you say they refresh your recollection as to the fact Mr. Mitchell said Weeks should not be included? A. They are pretty indefinite, as you read them. My recollection, you will notice, was not very good at that time as to exactly who raised the question, and it is not today.

Q. Do you remember testifying again, at page 1643, in answer to these questions, as follows:

"Q. Now, tell us as fully as you can what was said at the meeting about Mr. Weeks' participation in the $140,000? A. The question was raised whether the fund should be distributed exactly as it was shared in 1928, and the suggestion was made that Mr. Weeks was

no longer connected in any way with the company and he should receive no participation in this residue. That was agreed to by the Board.

553 "Q. Who raised the question? A. Who raised the question?

"Q. Yes. A. I do not recall, but I assume Mr. Mitchell did.

"Q. He suggested the omission of Mr. Weeks? A. I think Mr. Mitchell did."

Does that refresh your recollection? A. Yes; that refreshes my recollection on that.

Q. It was Mr. Mitchell who suggested that? A. I think it was Mr. Mitchell.

Q. Now, was it still your understanding at that time that the moneys paid out in July of 1929 were an enforcible debt due the company? A. I did not consider it, as I say, from a legal standpoint.

Q. Now, at that time, Mr. Rentschler received a portion of the $140,000, did he not? A. He did—wait a minute—do you tell me he did?

Q. I say he did. A. All right.

Q. At that meeting was there a question raised as to whether Mr. Rentschler should be permitted to participate in the fund? A. No.

Q. He was no longer an officer of the company, was he? A. He was not an officer, but he continued as a director.

Q. He still owed the company $100,000 on the July distribution, did he not? A. He did.

Q. And, nevertheless, no question was raised about his getting his portion of the $140,000? A. No.

Q. Is it not a fact that the resolutions for the management fund provides for distribution from it only to officers of the National City Company? A. That is correct.

Q. And is it not a fact that in the minutes of June 25, 1929,
554 authorizing the distribution at that time, that it was stated that by reason of the fact Mr. Rentschler had resigned as an officer of the company during the six months involved, that his distribution should be reduced to $100,000, that being less than the amount to which he would have been entitled had he been an officer throughout the period? A. That was provided in the resolution; yes.

Q. And still you raised no question about his getting his portion of a distribution in January of 1931? A. No question was raised.

Q. And it was paid to him in cash, was it not, without deduction of any kind? A. I assume it was.

Q. Do you remember the meeting of the Board on January 9, 1931, in which a consolidated balance sheet was approved for the year 1930? A. I do not specifically recall the date of the meeting.

Q. You remember there was such a meeting? A. I remember we approved the balance sheet.

Q. Do you remember that there was an item on that balance sheet, in the analysis of surplus and reserves, of $1,859,999, set up for the first time on the books of the company and approved by the Board of Directors? A. I cannot recall the items on the balance sheet.

Q. I show you a photostatic copy of a balance sheet, of the items, attached to the minutes of that meeting, Exhibit WW——A. This is the minutes of the meeting.

Q. Yes. A. What item?

Q. Analysis of surplus and reserves, $1,859,999, that being $1 less than the amount which was distributed in July of 1929. A. This is the time at which this item was written down to one dollar.

555 Q. That is the time when the reserve was set up first? A. I recall that; yes.

Q. That item represents, or, refers specifically, does it not, to the July 1929 management fund distribution? A. It appears to; yes.

Q. That is a reserve of the entire fund, less one dollar, set up on the books of the company out of the assets of the company; correct? A. I assume so. I am not an expert on accounting, but this is the time the reserve was set up. I will take your word on that.

Q. At that meeting, was there any discussion about the financial condition of the officers so far as their ability to repay that debt was concerned? Would you like to see the minutes? A. Yes.

Q. That is Exhibit VV. A. The question is what?

Q. Was there any discussion at that meeting as to the financial condition of the officers; that is to say, the financial ability of the officers to repay their debts arising out of the July 1929 distribution? A. I do not recall any discussion.

Q. Did you still, at January 9, 1931, regard that as a debt, Mr. Winston? A. I was looking at it entirely as a practical situation.

Q. That does not answer my question. A. I may regard a thing as a debt, but if it is not going to be collected, it is no good on a balance sheet.

Q. Can you tell me a single instance in the entire period of your connection with the City Company, in which a reserve of an entire amount of a debt, in which a reserve of $1 was set up

556 against it, without any inquiry whatever by the Board as to whether it was collectible?

(Objection by petitioner's counsel overruled and exception granted.)

The WITNESS. I do not recall of any other instance, no.

By Mr. DEWEY:

Q. Did you not know as a matter of fact there were many of the officers who still, at the time of the meeting, had assets in substantial amount? A. I know some of them did.

Q. And yet no one of those officers was asked to pay a penny before that reserve was set up, were they, so far as you know? A. No.

Q. Passing now to June 22nd, 1931, do you remember at that meeting a resolution was adopted increasing the salaries of the officers of the National City Company? A. I remember around that time there was a resolution.

Q. And Mr. Mitchell's salary was increased from $25,000 to $75,000, was it not? A. I do not recall the exact figures. It was something along that line.

Q. The schedule attached to the minutes so indicates. A. Then, that is correct.

Q. Was it not also a fact Mr. Mitchell's salary in that year from the National City Bank was increased to $125,000? A. I am not sure of that. I have heard it was increased, but I was not on the bank board.

557 Q. Were you not aware of the amount of the increase? A. I do not know whether I was at that time or not.

Q. You know now that the total amount of his salary from the two institutions was increased to $200,000 a year at that time? A. I know it was increased substantially.

Q. Do you not also remember, Mr. Winston, that about January of 1930, the sum of approximately $300,000, or $360,000, if I am correct, was distributed from the management fund of the National City Bank to Mr. Mitchell? A. No.

Q. Let me put it this way, Mr. Winston: You did know, did you not, that there was a payment by the National City Bank during the year 1930, of a management fund, to certain of its officers, of whom the petitioner, Mr. Mitchell, was one? A. I did not know that until quite recently.

Q. You now know it, do you not? A. I have been told it.

Q. And that it was in the sum of $383,000?

(Petitioner's counsel stipulated that petitioner received $383,000 from the management fund from the National City Bank in 1930, but objected to the admissability of the same as irrelevant and immaterial. Objection overruled and exception granted.)

Q. At any time, at any meeting of the Board of Directors of the National City Company, in December of 1929 or in 1930, did any director suggest, or did the petitioner suggest, that moneys arising out of the management fund of the National City Bank should

558 be applied against this indebtedness arising out of the July 1929 payments? A. I never heard of it.

Mr. WALLACE. We object to that as immaterial and not cross examination.

The MEMBER (Judge ADAMS). Overruled.

Mr. WALLACE. Exception.

The MEMBER (Judge ADAMS). You may have an exception.

The WITNESS. I do not recall any such suggestion.

By Mr. DEWEY:

Q. There were at that time several directors of the National City Company who were also directors of the National City Bank, as well as the petitioner, is that not so? A. Oh, yes.

Mr. WALLACE. May the last objection stand to this whole line of inquiry, your Honor?

Judge ADAMS. Yes.

By Mr. DEWEY:

Q. And the stock of both the National City Company and the National City Bank, as well as that of the City Bank Farmers Trust

Company, was all held by one single set of trustees? A. No. That is not the correct technical set-up.

Q. Will you describe it in your own accurate way? A. The stock of the bank is held by the stockholders, directly. The stock of
559 the company is in the hand of three trustees, and the equitable interest in the stock of the company belongs to the stockholders of the bank, and the trust company is set up in the same way as the company, except the trust company has a different set of trustees.

Q. In other words, anyone who buys one share of National City Bank stock gets his proportionate interest in the City Company, and the City Bank Farmers Trust, at the time we are discussing? A. He still does.

Q. And the stockholdings of the City Bank and the City Company were identical in every respect as to ownership? A. The ownership of the stock was in the same identical group of stockholders.

Q. Now, at the meeting of June 22, 1931, when these salaries were raised, as we have discussed, did any officer, director, or the petitioner suggest that any portion of that increased salary, or any of those increased salaries be applied against the July 1929 distribution? A. I do not recall any such suggestion.

Q. Coming down to October 10, 1932, do you recall a meeting at which the indebtedness of Mr. Lee E. Olwell, a former officer of the company was considered? A. I do.

Q. And do you remember a resolution in which it was stated he is indebted to this company for loans and advances made to him to the extent of $393,111.65? A. I recall that; yes.

Q. Plus interest from July 1, 1932? Do you recollect that that figure, stating that he was indebted to the company for loans and advances to the extent of $393,000, that that made no reference
560 to and did not include Mr. Olwell's distribution of July 1929 from the management fund? A. That is correct.

Q. And thereafter, do you remember, that indebtedness was reduced to $200,000 on the books? A. That specific indebtedness; yes.

Q. Was anything said at that meeting about Mr. Olwell's payment of July 1929? A. I do not recall anything.

Q. Do you know whether there was any discussion at any time on the Board of Directors of the National City Company authorizing elimination of the payment of July 1929 from consideration as debts?

(Objection by petitioner's counsel overruled and exception granted.)

The WITNESS. I do not.

By Mr. DEWEY:

Q. Did you still, on October 10, 1932, consider that the July 1929 distribution was a debt owing by the officers to the company? A. The thing had become entirely a practical question with me.

Q. That is not my question, Mr. Winston; did you or did you not? A. I did not consider it from a legal standpoint at that time at all.

Q. And did you personally make any inquiry to ascertain whether the figure stated as the extent of his indebtedness included the July 1929 distribution? A. No, I did not examine the figures.

Q. Now, coming down to December 28, 1931, do you remember that the Board of Directors—no. That is the wrong meeting, I take it. I want the December 1932 minutes; that is Exhibit AAA.

561

(The Clerk hands Mr. Dewey Exhibit AAA.)

By Mr. DEWEY:

Q. You remember that there was a meeting in December of 1932? A. Yes.

Q. In which a reserve was applied against the entire balance left in what was then known as the accounts receivable of the National City Company for this management fund distribution? A. I do.

Q. And that by reason of the cancellation of Mr. Ripley's portion, that then amounted to $1,710,000? A I do not recall the exact figure, but I assume that is right.

Q. Do you remember that there was a resolution on December 27, 1932, reading as follows:

"Resolved that the reserve of $1,709,999 now standing against an equal amount of accounts receivable on the books of the company representing obligations to the company from participation in the management fund of 1929, be applied against such accounts receivable and that the obligation of participants in the management fund of 1929 be carried on the books of the company at one dollar, without, however, in any respect releasing these participants from their obligation to the company."

562

The WITNESS. The answer to the question is yes.

Q. At the time of the adoption of this resolution, Mr. Winston, did you still regard the 1929 July payment as a debt? A. I told you that after the first of the year it was purely a practical question in my mind as to what was collectible.

Q. You have already testified no inquiry was ever made by you or any officer or director of the City Company, as far as you know, as to the collectibility of that obligation? A. I know it was not collectible from all of the officers; I knew it was not.

Q. With reference to the resolution of December 27, 1932, did any officer or director of the National City Company inquire whether all of the officers were insolvent at that time? A. I remember no such inquiry.

Q. Did they make any inquiry as to the financial condition of any of the officers at that meeting? A. I do not recall any such inquiry.

Q. Is it a fact this resolution which I have read from the minutes of December 27, 1932, was adopted without discussion? A. No.

Q. What discussion was there? A. The item, whatever the figure was at that time, $1,800,000——

Q. $1,709,000? A. Yes. At that time a reserve against it, up to the full amount of the item, less one dollar, was established. The effect of that was on the balance sheet you carried the $1,700,000 as

an asset and there was an offsetting reserve of $1,700,000. The effect of that resolution was simply to take it off both sides.

563 Q. I have not been allowed to elicit from you the effect of the resolution. A. That was the discussion at the meeting, to give that effect to the balance sheet.

Q. All right. Now, giving that effect, did anybody inquire whether that really represented the facts; that is to say, whether the debt was absolutely worthless? A. No.

Mr. DEWEY. I think that is all.

Re-direct examination by Mr. MOORE:

Q. Mr. Winston, you were never a participant in the management fund? A. No.

Q. That applies for the year 1929, as well? A. Any time.

Q. You spoke in your cross examination of the company filing a return showing the amount paid to the employees of the institution; are you referring to a certain return made on a specified Governmental form which is forwarded to the Treasury Department each year by the corporation? A. The information return as to compensation paid officers and employees.

Q. In that connection did the company also prepare a statement for the employees and officers, reporting to them the amount which they had returned to the Government? A. I understand it was done. I never saw it.

Q. And that was a custom which continued throughout the period you had been associated with the City Company? A. I received a statement of the amount of directors' fees which had been paid me each year.

Q. There was considerable discussion here as to the insertion
564 of the word "only" in the minutes of December 30, 1930, and you were asked concerning your opinion as to the effect of that word. Will you state whether, in your opinion, the word "only" added or substracted anything from the resolution as drafted, of December 30, 1929?

(Objection by respondent's counsel overruled and exception granted.)

The WITNESS. My opinion is it did not either add or detract from the effect.

By Mr. MOORE:

Q. In your cross examination you mentioned several times you were concerned with the practical effect of this obligation. Along that line, let me ask if the period subsequent to the stock market crash was not a rather critical one from the standpoint of the National City Company? A. It was very critical.

Q. A period during which you needed the unified support of all of the officers and employees? A. In my opinion, we did.

Q. And did not the directors of the National City Company give that matter a considerable amount of attention? A. I know I did.

Q. Did you not hear the matter discussed from time to time by certain of the other directors of the City Company? A. It was discussed from time to time in the Board meetings.

Q. And was there any discussion as to the effect on morale of recovering, or attempting to recover, or demand repayment from certain of the officers who had funds and who might have been
565 able to pay, upon the morale of the other officers of the company? A. I do not recall a specific discussion of that in any meeting, although it has been in my own mind and I have discussed it.

Q. With other directors? A. I think with other directors.

Q. And was that your opinion, that any attempt made to collect from some might very well undermine the morale of others? A. I do not see how you could treat one group other than except in the same way as all of them.

Q. And the recipients from the management fund were the leading executive officers under whose control the executive management of the company was? A. Yes.

Q. And responsible for the welfare and management of the company? A. Yes.

Q. You were also asked with respect to the set-up of a reserve of $1,859,999; did that in any way, in your opinion, change the effect of the obligation as set forth in the resolutions? A. No.

Q. Was it, in your opinion, merely a bookkeeping entry? A. It was.

Q. And at the time the obligation was written down to one dollar, in December 1932, did that in any way affect the nature of the obligation? A. No.

Q. Or the value of the obligation so far as its collectibility was concerned? A. No.

Q. Is it not your experience, Mr. Winston, that oftentimes items are carried on a corporation's books at a nominal value of one dollar, which are worth greatly in excess of that figure? A. I know of many such cases.

566 Q. Among such items you are probably familiar with, good will is often carried at one dollar, I understand, by many corporations? A. That is correct.

Q. You were familiar with that practice? A. Correct.

Q. It sometimes happens that real estate is also carried at a nominal figure? A. I do not recall a specific instance of that.

Q. Do you recall, in 1931, I think it was, that Joseph Ripley received some additional compensation from the National City Company for a particular bit of work he had done in a rather capable fashion? A. I do.

Q. Do you recall the services that he performed in that connection? A. He was responsible for the organization and flotation of a security in connection with a new steel company, which was quite successful, and he was helpful in refunding an issue of bonds, which was a very outstanding piece of work in that period of finance.

Q. Was that the National Steel Company financing which you are referring to? A. I am.

Q. In connection with that particular piece of work did the company give Mr. Ripley any additional compensation? A. It recognized his services in the cancellation of this obligation in connection with the 1929 management fund.

Q. Was that a reward requested by Mr. Ripley in that form? A. He requested recognition of his expert services and asked it be given him by cancellation of the obligation.

Q. Was that obligation cancelled on the books of the company? A. It was.

Q. And was Mr. Ripley's receipt destroyed or returned to him? A. It was returned to him.

567 Q. You were also questioned concerning Mr. Rentschler's participation in the fund. Mr. Rentschler was the recipient of $100,000 from the management fund of July 1929, the July 1929 payment, was he not? A. He was.

Q. Do you know whether Mr. Rentschler has repaid the sum of $100,000 to the National City Company? A. He has.

Q. I think you have already testified to this, but just to make sure, as a last question, I think you testified you talked to the petitioner in January of 1930 about the fact you did not consider the item of $1,860,000 a proper deduction for the National City Company; what I am not sure of as being in this record is the fact as to whether you told him it did not constitute taxable income to the individual recipients? A. I think my statement as to what I told him is accurately expressed in the criminal trial to the effect that it was not a proper deduction from the National City Company's income and expense; that the National City Company should not report it as compensation paid officers on its information return, and that it followed from that it was not income of the individual who had received it in 1929.

Q. That was your opinion at the time, and did you intend both the company and the individual recipients to act upon it? A. Yes.

Mr. MOORE. That is all.

Re-cross examination by Mr. DEWEY:

Q. Prior to the time when he repaid the $100,000, did not Mr. Rentschler discuss that with you? A. No.

568 Q. Did he not at some time before December of 1933, when I understand that payment was made, come to you and say he intended to pay it? A. He did not come to me.

Q. Did he not go to Mr. Cary, who advised him he should see a lawyer before repaying it?

Mr. MOORE. We object. That is hearsay.

Mr. DEWEY. I ask whether he knows.

The MEMBER (Judge ADAMS). I assume he could not know. Were you there?

The WITNESS. No.

By Mr. DEWEY:

Q. Did you ever discuss that with Mr. Rentschler afterward? A. No.

Q. You do not know, then, of your own knowledge, that Mr. Cary advised Mr. Rentschler? A. Of my own knowledge, I do not.

Q. Do you know the time when Mr. Rentschler went to Mr. Cary—was it not in March of 1933? A. Of my own knowledge, I do not know, but Mr. Cary has told me when it was.

Q. Do you not know Mr. Rentschler consulted another lawyer after he spoke with Mr. Cary? A. Only what Cary told me.

Q. Did Rentschler tell you? A. No.

Q. You did not discuss it with him? A. No.

Q. The matter came up first in March of 1933, did it not?

Mr. MOORE. He said he did not know.

The MEMBER (Judge ADAMS). This is hearsay, is it not?

569 By Mr. DEWEY:

Q. Did you consult with Mr. Cary, both of you being counsel to the National City Company, did you consult with Mr. Cary about the matter of Mr. Rentschler's payment?

Mr. WALLACE. The wheels of the gods grind slowly, but exceeding fine. Dewey has held me down and excluded every discussion——

The MEMBER (Judge ADAMS). The objection is sustained.

By Mr. DEWEY:

I proffer at this time as cross examination of this witness, who, at the time, was a director and counsel of the National City Company, testimony concerning advice given by his partner, Mr. Cary, to Mr. Rentschler, and his approval or disapproval of that advice, concerning whether Mr. Rentschler should or should not pay the $100,000 received by him in 1929, the purpose of the offer being to ascertain further whether this witness did or did not at the time regard that $100,000 payment to Mr. Rentschler, as to the other directors or officers in 1929, as a debt, and I offer it in connection with that.

The MEMBER (Judge ADAMS). In connection with counsel's statement, I want to make this statement: Having stated your purpose so clearly, if you can show by this witness he gave any such
570 advice to Mr. Rentschler, it would be quite proper for you to get that testimony from this witness, to shed light upon his prior testimony. If, on the other hand, you seek to show that he stated to his partner, Mr. Cary, an opinion contrary to that which he has expressed here, you may ask him that, not for the purpose of original testimony, but as a predicate, which, if the answer is not satisfactory, you will know how to follow it up.

Mr. DEWEY. I do not intend to call any witness on that subject.

The MEMBER (Judge ADAMS). I sustain the objection to the question.

Mr. DEWEY. I do not intend to call any witness.

The MEMBER (Judge ADAMS). The objection will be sustained.

Mr. DEWEY. Exception.

That is all, your Honor.

The MEMBER (VAN FOSSAN). I want to make a few inquiries in regard to this management fund, Mr. Winston. I note from an examination of the work sheets purporting to have been prepared by Mr. Mayer, that as nearly as I can understand them, and I am not an expert in interpreting figures, but as nearly as I can understand them, the company, on October 31, 1929, had some $4,000,000 set aside in this fund; on November 30, 1929, the recalculation reduced that to $1,929,000. I am unable to determine to my own satisfaction from the December calculation, whether the notation which is here
571 "leaving no balance for management fund calculation" applies to the entire year and means there should never have been anything in retrospect apportioned to the management fund, or does it mean something else?

The WITNESS. It means there never should have been any payment out of the management fund, exactly as you say.

The MEMBER (VAN FOSSAN). Does this note "reserve for O. D.," does that mean other deductions?

The WITNESS. I think so. I think that was the account the management fund was carried under.

Mr. DEWEY. That was the name by which it was known on the books of the City Company.

The MEMBER (VAN FOSSAN). What was the profit sharing fund?

The WITNESS. That was another fund that went to subordinate officers in the company and had nothing to do with the management fund, except it was an expense of operation which came out before you calculated the net balance.

The MEMBER (VAN FOSSAN). That came out before you calculated what was available for the management fund, I assume?

The WITNESS. Correct.

The MEMBER (VAN FOSSAN). I notice there was a payment of some $250,000 from the profit sharing fund in December 1929?

The WITNESS. I am not familiar with those. I do not carry those figures in my mind, but that profit sharing fund, as I
572 understand it, would be made, irrespective of whether the company itself made a profit. It was additional compensation to certain subordinate officers for work they had done during the course of the year.

The MEMBER (VAN FOSSAN). Had there ever been a month in which the management fund did not receive an accretion, previous to November 1929?

The WITNESS. I do not think so. There may have been in the past one month where the interest deduction of 8 per cent on your capital would mean that there would be a decrease in the management fund in the succeeding month.

Mr. WALLACE. For the sake of the record, I do not understand whether your Honor's question related to the year 1929. The witness said, "In the past."

The WITNESS. I understood it at any time.

The MEMBER (VAN FOSSAN). I am speaking generally, for some time prior.

Mr. DEWEY. I am willing to stipulate that Mr. Winston did not come to the City Company until 1928.

The WITNESS. 1927.

Mr. DEWEY. And may not be as familiar with the old matters as counsel are, and I am willing to stipulate Mr. Mitchell having suggested it should be done, that there were some months in the earlier years in which there were not additions to the fund and there were subtractions from the fund by reason of that fact; that is to
573 say, taking the whole year, if, in the ninth month of the year the company lost money on the books or made less than 8 per cent, then, after computing all of the nine months there would be a subtraction from the fund, and Mr. Greenbaum calls my attention to the fact in Paragraph 53, that this stipulation provides:

"In those months in which the company suffered losses, this account was correspondingly reduced."

The MEMBER (VAN FOSSAN). I was interested to know whether it was a general practice that would have been followed, or whether it was actual experience.

Mr. DEWEY. It actually did happen.

The WITNESS. But there was nothing in the management fund until 1929.

The MEMBER (VAN FOSSAN). Are you familiar with the total number of shares of National City Bank outstanding, changing the subject entirely?

The WITNESS. I am familiar with what is outstanding today.

The MEMBER (VAN FOSSAN). 1929?

The WITNESS. We have to go back——

The MEMBER (VAN FOSSAN). Can you approximate it?

The WITNESS. I should say about 5,000,000 shares in 1929.

The MEMBER (Judge ADAMS). Will you gentlemen stipulate that?

Mr. MOORE. There was a five to one split in January 1929. Do you mean before or after?

574 The MEMBER (VAN FOSSAN). In December 1929.

Mr. MOORE. I think it was five million, odd.

The MEMBER (VAN FOSSAN). Have you any information or knowledge as to the average daily turnover—this was carried on the New York Stock Exchange?

The WITNESS. No; it was traded in over the counter.

The MEMBER (VAN FOSSAN). Do you have any knowledge as to the average daily turnover in over-the-counter sales?

The WITNESS. I have seen the figures, but they varied so in different periods I would not know what they were at any given time. I did not pay much attention to the market of the City Bank stock.

The MEMBER (VAN FOSSAN). What knowledge is available to the public generally of over-the-counter sales?

The WITNESS. I do not believe there is anything except the prices. There is nothing I have ever seen as to the quantity of stock dealt in.

Mr. DEWEY. I could stipulate in answer to your Honor's question.

Mr. MOORE. I think we can agree there is no compilation published, or even obtainable, of the aggregate sales in over-the-counter stock. The nearest approximation is the bid and asked quotation, and that is picked up by various newspapers, whose representatives go to certain houses and ask what the last bid and asked price is, and
575 that may be based on any given number of shares; it may be a block of ten or one hundred——

The MEMBER (VAN FOSSAN). Is this accurate: That the only party or organization that knows the number of shares that has been traded in on any day or throughout a given period is the corporation which makes the transfer of the stock on its books?

Mr. MOORE. That would be delayed, I presume, according to when the certificates were transferred. Possibly over a period of a year or less you might strike an average of the transfers, but oftentimes stock is kept in street names and endorsed in blank, for a long period of time. I think the only accurate way in which it could be done would be to go to every one of the fifty, sixty, or seventy over-the-counter houses each day and ask them for their specific volume, and no organization has yet been set up that does that in New York City.

The MEMBER (VAN FOSSAN). For the purpose of the record, do you stipulate that?

Mr. DEWEY. I stipulate everything Mr. Moore has said in response to your Honor's question; we agree on the matter, except I do not know how many over-the-counter houses there are, but there are many. I think perhaps it might properly be added that during the year 1929 and throughout that year the National City Company was the major factor in maintaining the market and in putting
576 through trades over the counter in National City Bank stock. I think that is a fair statement—Mr. Mitchell says no.

Mr. MOORE. There was a certain group of houses that specialized in National City Bank more than others. I do not think it is a fair statement the National City Company——

The MEMBER (Judge ADAMS). If it is not conceded to be a fair statement of course, you cannot stipulate.

Mr. DEWEY. I think it is a fair statement the National City Company traded very largely in the National City Bank stock during the year 1929.

Mr. MOORE. For whatever it is worth, although not conceding the relevancy, I am willing to make that statement.

There is one question I do not know whether it has been asked Mr. Winston, but is it a fact that in the early months of 1930 and until the substantial decline in the market after the spring of 1930, there were accumulations in the management fund which were subsequently wiped out that year by losses?

The WITNESS. There were accumulations in January and February of 1930.

The MEMBER (Judge ADAMS). Your firm was general counsel for the National City Bank, the National City Company and affiliates?

The WITNESS. We were not general counsel for the trust company.

The MEMBER (Judge ADAMS). Were you counsel for Mr. Mitchell, personally?

577 The WITNESS. No.

The MEMBER (Judge ADAMS). Did you ever act in that capacity; were you ever his employed attorney?

The WITNESS. No.

The MEMBER (Judge ADAMS). You quite naturally, he being the president and chairman of the two institutions connected together, which you did represent, were in frequent contact with him?

The WITNESS. That is the usual course for counsel for a large corporation.

The MEMBER (Judge ADAMS). Reverting to the resolution of December 30, 1929, which dealt with the management fund, part of which had been paid in June or July of that year, you have stated that you regarded that as a legally enforcible obligation as against these parties who received it?

The WITNESS. Certainly.

The MEMBER (Judge ADAMS). Now, this resolution of December 30th, you saw it before it was adopted?

The WITNESS. At the meeting there was no typewritten or written resolution. The substance of the action taken by the Board was agreed upon and I drew that after the meeting.

The MEMBER (Judge ADAMS). But the act was done on December 30th?

The WITNESS. Yes, sir.

Mr. DEWEY. Excuse me, but there were two December 30th resolutions, one in 1929 and one in 1930. I understand your Honor's questions were about 1929?

578 The MEMBER (Judge ADAMS). Yes.

Mr. DEWEY. I am sorry. I just wanted to make that clear.

The MEMBER (Judge ADAMS). Did you examine the question from the standpoint of whether the legal effect of what was done on December 30, 1929, was a release or a forgiveness of that indebtedness which had come about by reason of the advance payment of this management fund?

The WITNESS. I did not so consider it.

The MEMBER (Judge ADAMS). Did you examine it with that in view? If you were correct it was a legally enforcible obligation, of course, it would have been as enforcible as any other obligation and all of the assets of any one of the parties liable would have been subject to payment of the indebtedness?

The WITNESS. Certainly.

The MEMBER (Judge ADAMS). This resolution limited the fund from which payment could be demanded to a certain fund to which these parties owing the debt were entitled or might be entitled thereafter; was that the legal effect of that?

The WITNESS. That is what it states in the resolution, but I think as to legal effect you could have recovered, irrespective of the limitation as to manner of payment.

The MEMBER (Judge ADAMS). Do you have in mind in making that statement that the resolution was ultra vires in its nature?

579 The WITNESS. No.

The MEMBER (Judge ADAMS). Do you have in mind the Board of Directors had no power to do what they did; that what they did was illegal?

The WITNESS. No. It is on the basis there was no consideration for releasing this debt.

The MEMBER (Judge ADAMS). Very well. Is there anything further?

Mr. DEWEY. Nothing further.

Mr. MOORE. Your Honor, in your questions, has raised two matters I would like to clear up.

Re-direct examination by Mr. MOORE:

Q. The basis for your statement, I presume, Mr. Winston, that there was no consideration is placed on the ground there was no management fund, and since there was none, they gave up nothing at the time the paper was signed? A. My view of it was it was just as if I had overdrawn my account in the partnership fund and therefore was not entitled to that much of my share, and because the profits were less, I would have to pay it back.

Q. Were you aware of a situation in the company in which certain loans were made to officers, I think, at a period somewhat subsequent to the first stock market break of 1929? A. I am familiar with the loans that were made by certain trustees on behalf of the bank to officers.

Q. In connection with salary increases to any of the persons who had outstanding loans, were portions of those salary increases, or the entire salary increase withheld by the bank or company

580 and applied against such loans? A. I know of no such case.

Q. The question was asked whether you were Mr. Mitchell's counsel. Your firm had represented the National City Bank and Company for a great many years under retainer, I presume? A. That is correct.

Q. In the period between 1927 and January 1930, did you know that your firm had advised and that Mr. Mitchell had consulted your firm for legal advice from time to time? A. I assumed he had. The question the Court asked me was whether I had been employed by Mr. Mitchell personally, and I had not.

Q. You knew your firm had been consulted by him? A. I did.

Q. And at the time of January 1930, and prior, had you ever heard that Mr. Mitchell had any independent personal counsel of his own other than the firm of Shearman & Sterling? A. I want to correct my statement. I do recall an instance where I advised him on a personal matter, independent of the company.

Q. You want it understood Mr. Mitchell had come to you seeking advice? A. Yes.

Q. And you investigated the problem he presented to you and advised him as a lawyer advising a client? A. That is correct.

Mr. MOORE. That is all.

The MEMBER (Judge ADAMS). Any further questions?

Mr. DEWEY. No questions.

The MEMBER (Judge ADAMS). Call your next witness.

(Witness excused.)

581 Petitioner's counsel offered paragraph 101 of the Stipulation of Fact, which was received in evidence, as follows:

"101. For the calendar year 1931 Mrs. Mitchell reported on her individual tax return the sum of $73,200 as dividends received from 18,300 shares of National City Bank stock. For the same year Mrs. Mitchell deducted as interest paid to petitioner during said year the sum of $196,678.18."

Objection taken by Respondent upon the ground that it was immaterial what Mrs. Mitchell did in regard to her personal income tax return; objection overruled; exception taken.

Whereupon JOSEPH MOSS was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DEWEY:

Q. Mr. Moss, were you, in January of 1930, the owner of any stock of the National City Bank? A. Yes, sir. I owned personally a little over 400 shares.

Q. And did you go to the annual meeting of the stockholders of the National City Bank in January of 1930? A. I did, sir.

Q. Do you remember that certain questions were asked there of the Chairman, Mr. Mitchell? A. Yes, sir.

582 Q. Do you remember whether or not a question was asked of the Chairman, Mr. Mitchell, concerning his personal holdings of the National City Bank stock? A. I do.

Q. Do you remember the question and the answer?

Mr. MOORE. May we not have by whom the question was asked?

By Mr. DEWEY:

Q. Do you know? A. A gentleman I do not know, but whom I ascertained later to be a Mr. Summers, of New York City.

Q. S-o-m-m-e-r-s? A. S-u-m-m-e-r-s.

Q. I think it is Sommers, but we will not discuss it. Will you now tell us what the question was and what answer Mr. Mitchell made to the question? A. He asked Mr. Mitchell whether or not he had sold any of his stock in the National City Bank and Mr. Mitchell's reply was, as near as I can recall his words, "I have not sold any of my stock; on the contrary, I have increased my holdings, and no one can have my stock around the present figures."

Mr. DEWEY. That is all.

The MEMBER (Judge ADAMS). Cross examine.

Cross examination by Mr. MOORE:

Q. Mr. Moss, when did you acquire your stock in the National City Bank? A. At various times, commencing with the year 1922.

583 Q. Had you ever attended a stockholders' meeting before? A. That was the first one, and I attended another in 1931, the following year.

Q. How many people were present? A. It was a room about the size of this. The place was crowded and there were people standing, with all of the seats taken. I should say there were 300 there.

Q. Were you seated? A. I was in the second row—to the left, you might say.

Q. Do you remember who were on the platform? A. I saw Mr. Mitchell, and a gentleman who I think was Mr. Guy Cary, and I think there was a Mr. Linfesty, the cashier of the bank; that is about all I can recall right now.

Q. Did you ask any questions yourself at the meeting? A. I asked a couple of questions and delivered a speech in favor of Mr. Mitchell.

Q. When did you first talk to any representative of the Internal Revenue Bureau about this case? A. A gentleman called me on the telephone and said his name was Mr. Dewey. He said he was speaking from New York City, and afterwards I spoke to him.

Q. How long ago was that? A. About a week or ten days ago.

Q. Had you been interrogated about this case at any time in the spring of 1933? A. Yes. Mr. Ten Eyck, of the New York District Attorney's Office, called me on the telephone.

Q. That was prior to the trial in New York City? A. While it was going on.

Q. And by the trial, we mean the case of United States vs. Mitchell, tried in New York in May and June of last year? A. Yes.

584 Q. Before the termination of the trial you told your story to Mr. Ten Eyck? A. Yes; and also wrote him a letter.

Q. Of course, you told him the same story you have told here today? A. The same thing.

Q. After you told your story to Mr. Ten Eyck, did you hear from him further? A. He wrote me a letter telling me to hold myself in readiness and not discuss the matter with anyone. Then I received another letter saying my services would not be necessary and thanking me.

Whereupon, ISADORE B. SUMMERS was called as a witness by and on behalf of the respondent and, having been previously duly sworn, testified further as follows:

Direct examination by Mr. DEWEY:

Q. State your full name. A. Isadore B. Summers.

Q. Mr. Summers, in January of 1930, were you the owner of shares of National City Company stock? A. I was.

Q. Approximately how many? A. Approximately 350.

Q. And did you attend the annual meeting of the stockholders of that institution in January of 1930? A. I did.

Q. Did you address certain questions to the Chairman, Mr. Mitchell? A. I did.

Q. And among others, did you address a question to him concerning his own stockholdings in the bank? A. I did.

585 Q. Will you tell the Court the question which you asked on that subject and the answer Mr. Mitchell made?—A. As an interested stockholder, I was greatly——

Q. Just say what you said to Mr. Mitchell, Mr. Summers. A. I inquired from Mr. Mitchell as to whether he had disposed of any of his stock. He said, "Not a single share, sir; as a matter of fact, I am buying all I can possibly get and that I can possibly pay for."

Q. Did you address any further questions on that particular subject to Mr. Mitchell? A. I said, "If that is the case it must be a valuable investment at the present price, and if you are buying all you can lay your hands on and all you can possibly pay for"——

Then he said: "While we cannot control the market, I am buying it. I think it is all right."

Mr. DEWEY. That is all.

Cross examination by Mr. MOORE:

Q. Mr. Mitchell said all of that at the stockholders' meeting to you? A. Yes.

Q. From the platform? A. From his chair.

Q. He said he thought the stock of the National City Bank was all right? A. He thought it was all right; yes.

Q. Did he hesitate in the same way you hesitated in making the statement, as if there was some question about it? A. No; I do not think he hesitated very much.

Q. Why did you ask him that question; did you want to get a tip on the market? A. That did not apply to the stock market, but to the National City Bank only.

586 Q. Did you buy any more stock after the meeting? A. I did.

Q. Because you thought the tip was a good one? A. I thought if the Chairman of the Board was buying it it was good enough for me, too.

Q. How many shares of National City Bank stock do you own now? A. About 250.

Q. What is the maximum number of National City Bank stock shares you have held between October 1929, and the present date? A. Do you mean at any one time?

Q. At any one time; yes. A. I believe a little over 500.

Q. These 350 shares that you say you owned in January of 1930, when did you acquire them? A. In 1927.

Q. At about what price? A. Well, I bought the old stock prior to the split-up at the last time that rights were issued. I bought from the National City Company rights—I believe the rights were selling at $142 a right. The old stock stood me about $485, the original purchase.

Q. Before it was split five to one? A. Yes.

Q. So your stock averages about $100 a share, the cost? A. I guess it averaged more than that.

Q. Did you sell National City Bank stock at a profit? A. No; I am sorry that I did not.

Q. You have incurred substantial losses on your National City Bank stock, have you? A. I have sold some at a loss.

Q. Have you sold any at a profit? A. Not a great deal; very little, if any.

Q. As you stand now, do you stand as in the black or in the red on your National City Bank stock sales? A. I imagine I stand
587 in the same position that anybody else who is the owner of the stock.

Q. Do your present holdings show you as——

The MEMBER (Judge ADAMS). What is the purpose of this inquiry?

Mr. MOORE. I am trying to find out if his present holdings show him a substantial loss.

By Mr. MOORE:

Q. Is that so? A. I guess it does.

Q. You were not, after January 1930, in favor of the management fund of the National City Company, were you, Mr. Summers? A. Well, I never knew of any such thing in existence until it came out in the open a short time ago in the courts.

Q. You never knew of that at all? A. I never knew there was such a thing as a management fund.

Q. At this meeting in January 1930, what did Mr. Mitchell do in addition to answering your question; did he say anything else? A. He read the report.

Q. The printed report? A. Yes.

Q. How far away were you sitting while he was reading that report? A. Not very far away from the Chairman.

Q. You could hear him perfectly? A. Yes.

Q. And you say you never heard him say anything about management fund of the National City Company or bank until it came out—you never heard of it until it came out recently? A. I never understood.

588 Q. I am not asking for your understanding; I asked you if you ever heard anything about a management fund. A. I do not remember hearing it, but if I had, I might have treated it in my own mind as a bookkeeping entry.

Q. Did you hear anything about a management fund in the January 1930 meeting? A. I might have heard, but I do not think I paid any attention to it. I simply thought if they did set up a fund, as long as they had not distributed the money I did not care what they set up. I thought it was simply a bookkeeping entry. I treated it as a bookkeeping entry in my mind.

Q. Do you think that was an answer to my question as to what you heard about the management fund? A. I think it is the best answer a layman could give.

Q. Mr. Summers, you know that within the last two or three weeks you offered your services as a witness against the National City Bank, do you not? A. I have not offered my services. I have been a witness in a suit; yes.

Q. On behalf of the plaintiff stockholders against the National City Bank and the directors? A. Not against the National City Bank, but against the former directors and officers of the National City Bank.

Q. Did you not appear as a witness in the case of Gallin vs. National City Bank and others? A. Yes.

Q. And was not Mr. Mitchell one of the defendants named? A. Yes.

Q. Do you not remember you got on the stand and said at that meeting nothing was said whatsoever about a management
589 — fund? A. I remember exactly what I said on the stand at that time, and if the Court will permit me, I will repeat it here.

Q. You said you had never heard anything about a management fund until it came out in the papers recently, did you not; answer that "yes" or "no." A. That is what I said. I paid no attention to it and treated it as a bookkeeping entry.

Q. Why did you make the inquiry of Mr. Mitchell about his personal stockholdings? A. Because I wanted to know what to do with my own stock; whether to sell or retain it.

Q. You wanted to find out what he was doing with his stock? A. Yes.

Q. You held your stock for investment? A. I held it for the same purpose as everybody else, for enhancement and to make money on it.

Q. Was it registered in your own name? A. It was.

Q. And you wanted to know whether you should hold on to it for a long period of time or whether you should sell it? A. Exactly.

Q. And therefore you wanted to ask him what he was doing with regard to his stock, which was in the same position as yours? A. Exactly.

Mr. MOORE. That is all, your Honor.

The MEMBER (Judge ADAMS). Where do you live?

The WITNESS. New York City.

The MEMBER (Judge ADAMS). What is your business?

The WITNESS. I used to be in the leaf tobacco business.

590 The MEMBER (Judge ADAMS). That is all.

Mr. DEWEY. No further questions.

(Witness excused.)

Offers in evidence

Petitioner's counsel offered the following paragraphs of the Stipulation of Fact, and the exhibits referred to therein, which were received in evidence:

"105. On April 25, 1933, an indictment was returned against petitioner by a Grand Jury of the District Court of the United States

for the Southern District of New York (Exhibit 59). To both counts in that indictment the petitioner entered a plea of not guilty.

"106. Thereafter, petitioner was tried upon the charges contained in said indictment before Judge Henry W. Goddard and a trial jury in the said United States District Court, the trial commencing May 11, 1933, and terminating on June 22, 1933. A copy of the court's charge to the jury is contained in Exhibit 60.

"107. On June 22, 1933, a verdict of not guilty was returned by the jury on all counts of the indictment. A copy of the docket entries is Exhibit 61."

Counsel for respondent objected to paragraphs 105, 106, and 107 and exhibits 59, 60, and 61 upon the grounds that the
591 questions involved in the other trial are not the same as those presented in this case; that the facts stated therein are inadmissible; that the acquittal in the criminal case is no bar to and is not admissible in evidence in a subsequent civil action unless the object is to punish for the same act for which petitioner has previously been tried; and on the further ground that the only question determined in the criminal case was that the petitioner had not been proven guilty beyond a reasonable doubt and that is not the rule by which the proofs submitted before the Board is to be considered. Objection overruled; exception.

(Exhibits 59, 60, and 61 received in evidence.)

Mr. WALLACE. Then, I present the following agreement or stipulation between counsel here for the petitioner and the respondent——

The MEMBER (Judge ADAMS). This is not contained in the printed stipulation?

Mr. WALLACE. No, sir. Its object is to avoid my feeling that we needed the transcript of the testimony to be there, and it is a big mass of stuff and we have obviated it by this stipulation:

That the issues so actually tried were those disclosed by the averments of the indictment; that evidence was offered by the Government in support of each of those charges and by defendant against each thereof and was received upon the trial, and that for
592 the purposes of this case the Government will not at any stage thereof raise the objection that those issues were not sufficiently disclosed by the indictment, plea, and charge.

Mr. GREENBAUM. May I suggest instead of the word "disclosed" that the word "identified" be substituted? Would "identified" be agreeable?

Mr. WALLACE. I am agreeable; all I want is the substance of the matter.

The MEMBER (Judge ADAMS). With that amendment, do you agree to the stipulation?

Mr. GREENBAUM. We do, it being understood we are not conceding the admissibility of the facts. The statement is solely for the purpose of avoiding the necessity of showing more clearly what has been done heretofore.

The MEMBER (Judge ADAMS). The record may show this as being the truth, but you object on that ground, the admissibility, although you agree it is the fact?

Mr. GREENBAUM. That is correct.

The MEMBER (Judge ADAMS). Then the objection is overruled and the stipulation will become part of the record and you may have your exception.

Mr. GREENBAUM. So there will be no doubt about the Government's part, and I think the petitioner's position is clear, too, there is nothing to be taken or construed from that stipulation to in any way indicate or imply that the issues in the criminal trial were the same as the issues in the present trial. The stipulation is to
593 the effect petition has clearly shown what the issues in that trial were, but the stipulation does not bind the Government to the fact there is any identity of issue herein.

The MEMBER (Judge ADAMS). That is your understanding?

Mr. WALLACE. Clearly so. All we do is to remove from the controversy the possible contention that there is not here an adequate record to show the issue of res adjudicata, but the whole contention of the case that there is no res adjudicata, the contention of the Government, is completely preserved.

The MEMBER (Judge ADAMS). The Board having the duty of determining whether the issues are the same, if they conceive that to be a material issue, would have the facts on which to base a finding?

Mr. GREENBAUM. Yes, sir. We deem it to be our duty to see that the Government's position be fully protected and we want to be sure we do not overlook any point in making the position clear. I will ask petitioner's counsel to say whether or not it is understood there is nothing which has happened in the proceedings and in the stipulation entered into before your Honor that in any way indicates that the issues involved in that suit, including certain allegations of the indictment—it is understood that nothing in the stipulaion made by the Government was in any way to be deemed to deprive the
594 Government of its right to contend that certain allegations in the indictment in regard to fraud were surplusage and that the real issues are as indicated by the statement of Mr. Wallace in reference to the matter, as stated in the stipulation, that the defendant was tried for violation of the statute set forth in the indictment.

The MEMBER (Judge ADAMS). Is there any objection to the stipulation being qualified by the statement of counsel?

Mr. WALLACE. No, sir. All we want is to preserve our contention and to have a record which shall be regarded as against technical objection, as adequate to present the question. We do not want any foreclosure of any contention that the Government may make upon the matter.

(At this point it was stipulated and agreed between counsel that printed copies of the stipulation might be filed with the Clerk within two weeks from date, containing the changes made on said printed copies as they were made throughout the trial and giving in the copy

to be filed the new exhibit numbers given during the trial, and that such stipulation should be considered part of the record.)

Mr. GREENBAUM. In view of the testimony given yesterday by Mrs. Mitchell as to her charitable contributions, I offer in evidence a statement from her income tax return for the year 1929, listing her charitable contributions in the total sum of $5,865. That is the only item in the return that the Government is offering, and there-
595 fore I ask that that fact go into the record without the necessity of marking the exhibit.

(Objection by petitioner's counsel sustained and exception granted.)

Mr. GREENBAUM. Without encumbering the record, I offer to show the contributions from the same sources in 1930.

The MEMBER (Judge ADAMS). For the purpose of your exception, you may put in the record the facts you wish to prove.

Mr. GREENBAUM. We tender to prove that for the year 1930 the corresponding amount was $3,705. I think it is stipulated.

Mr. WALLACE. Are you through with that point?

Mr. GREENBAUM. Yes.

(Objection by petitioner's counsel sustained and exception granted.)

Mr. GREENBAUM. I believe it is an agreed fact the petitioner did not report the sum of $666,666.67, being the July 1929 management fund distribution; that that was not reported by the petitioner in any year subsequent to 1929. It has already been shown it was not reported in that year.

The MEMBER (Judge ADAMS). Is that agreed to?

Mr. MOORE. That is conceded.

The MEMBER (Judge ADAMS). That will go into the record as an admitted fact.

(Respondent's Exhibit FFFF was offered and received in evidence.)

(Counsel for petitioner and respondent stipulated that this agreement which has been offered in evidence and marked FFFF,
596 be understood to be the loan agreement signed by petitioner in March of 1923; that the loan represented by this agreement was subsequently paid off in full, as shown by the exhibit FFFF; that no other loan agreement was signed by petitioner, and this was retained in the files of J. P. Morgan & Company.)

(Respondent's Exhibits GGGG, HHHH, and IIII for id. offered in evidence by respondent. The Board reserved ruling on the admissibility of the same, after statement by petitioner's counsel as follows: "I think the Court has ruled on that point and has sustained objections directed to that point, and I raise the same objection.")

Petitioner and respondent rested, and stated through their respective counsel that they had no further evidence to present, and submitted the case to the members of the U. S. Board of Tax Appeals hearing the proceeding.

The petitioner, Charles E. Mitchell, tenders and presents the foregoing as a statement of all of the evidence adduced at the hearings

before the Board of Tax Appeals material to the Assignments of Error contained in the Petition for Review in this case and the same is approved by the undersigned, attorney for the Petitioner on Review, and prays the same be approved by the U. S. Board of Tax Appeals and made a part of the record of this cause.

WILLIAM WALLACE,
Attorney for Petitioner.

597 *Agreement with respect to statement of evidence*

The foregoing evidence is all of the evidence adduced at the hearings before the Board of Tax Appeals material to the Assignments of Error contained in the Petition for Review in this case and the same is approved by the undersigned, Herman Oliphant, General Counsel for the Department of the Treasury, as Attorney for Guy T. Helvering, Commissioner of Internal Revenue; and it is agreed that such statement may be approved by the Board members or any of them hearing the case, without further notice to any party hereto and that when so approved may be filed in the Clerk's office and become a part of the record for the purpose of the Petition for Review in said cause filed by petitioner.

Dated July 17, 1936.

HERMAN OLIPHANT,
General Counsel for the Department of the Treasury,
ROBERT H. JACKSON,
Assistant Attorney General,
Attorneys for Respondent.

Order settling statement of evidence

The foregoing Statement of Evidence is duly approved and settled this 31st day of July 1936.

(Sgd.) EUGENE BLACK,
Member of the United States Board of Tax Appeals.

598 In United States Circuit Court of Appeals, for the Second Circuit

[Title omitted.]

Order and consent as to exhibits and statement of the evidence

Filed May 20, 1936

Upon the annexed consent of William Wallace, attorney for petitioner, and Herman Oliphant, General Counsel for the Department of the Treasury, and Robert H. Jackson, Assistant Attorney General, attorneys for the respondent, it is

Ordered, that the original exhibits numbered Petitioner's Exhibits 1 to 53, inclusive; 55 to 57, inclusive; and 59 to 61, inclusive; and

Respondent's Exhibits A to Z, inclusive; AA to ZZ, inclusive; AAA to FFF, inclusive; NNN, YYY, ZZZ, and AAAA to FFFF, inclusive; now on file with the Clerk of the Board of Tax Appeals and heretofore introduced and received in evidence before the Board in the above-entitled proceeding, and Respondent's Exhibits for identification, GGGG, HHHH, and IIII, be transmitted physically by
599 said Clerk of the Board of Tax Appeals to this Court and filed with the Clerk herein and that such exhibits shall be treated as physical exhibits and form part of the record on petition for review herein and may be physically presented and submitted to this Court for its consideration upon the argument of this cause; and it is

Ordered, that the Clerk of the Board of Tax Appeals be and he hereby is directed to make such transmission of said exhibits upon the inclusion of a request therefor in the praecipe filed by either party with the Board of Tax Appeals and that such original exhibits be made part of the record on petition for review in the above-entitled proceeding to be transmitted to this Court; and it is further

Ordered, that the rule requiring the Statement of Evidence to be in narrative form be and the same hereby is dispensed with, and that such Statement of Evidence and the printed record may contain in whole or in part in question and answer form the testimony given before the Board of Tax Appeals in the above-entitled proceeding.

Dated New York, May 1st, 1936.

MARTIN T. MANTON,
Judge of the United States Circuit Court of Appeals.

600 The undersigned hereby consent to the entry of the foregoing order without notice to either party.

Dated May 1st. April 29th, 1936.

(s) WILLIAM WALLACE,
Attorney for Petitioner.

(s) HERMAN OLIPHANT,
General Counsel for the Department of the Treasury,

(s) ROBERT H. JACKSON,
Assistant Attorney General,
Attorneys for Respondent.

A true copy:
[SEAL] (s) WM. PARKIN, *Clerk.*

601 Before United States Board of Tax Appeals

[Title omitted.]

Praecipe for record

Filed July 17, 1936

TO THE CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

Please prepare a transcript of record in this cause and on or before the 1st day of August 1936, transmit the same to the Clerk of the United States Circuit Court of Appeals for the Second Circuit and

include in said transcript copies, duly certified as correct, of the following documents:

1. Docket entries of proceedings before the Board in the above entitled cause.

2. Petition for redetermination filed on or about January 19, 1934.

3. Answer to petition filed on or about March 8, 1934.

4. Minutes of August 6, 1934, granting petitioner's motion for leave to file a reply nunc pro tunc.

5. Petitioner's reply filed on or about August 6, 1934.

602 6. Findings of fact and opinion of Board promulgated on or about August 6, 1935.

7. Order of redetermination entered on September 20, 1935.

8. Petition for review filed by petitioner on or about December 4, 1935.

9. Statement of evidence as settled and allowed.

10. Order of the United States Circuit Court of Appeals for the Second Circuit, dated May 1, 1936, directing that certain original exhibits be transmitted physically by the Clerk of the Board of Tax Appeals to the United States Circuit Court of Appeals for the Second Circuit and filed with the Clerk of that Court; that such original exhibits be made part of the transcript of record; and that a narrative statement of evidence be dispensed with.

11. Orders enlarging the time for the preparation of statement of evidence and transmission of the record to the Clerk of the Circuit Court of Appeals for the Second Circuit. (Not included in record.)

12. This praecipe for transcript.

In addition to the foregoing documents, please transmit as part of said transcript of record the following:

13. One of the counterparts of the original stipulation of fact between petitioner and respondent dated April 25, 1934.

14. The following exhibits in their original form, pursuant to the said order of the United States Circuit Court of Appeals

603 for the Second Circuit, dated May 1, 1936: Original exhibits numbered Petitioner's Exhibits 1 to 53, inclusive; 55 to 57, inclusive; and 59 to 61, inclusive; and Respondent's Exhibit A to Z, inclusive; AA to ZZ, inclusive; AAA to FFF, inclusive; NNN, YYY, ZZZ, AAAA to FFFF, inclusive; and Respondent's Exhibits for identification, GGGG, HHHH, and IIII.

Said transcript to be prepared as required by law under the Rules of the United States Circuit Court of Appeals for the Second Circuit.

Respectfully,

(Signed) William Wallace,
WILLIAM WALLACE,
Attorney for Petitioner.

The service of a copy of the above Praecipe is hereby acknowledged and the same is agreed to.

(Signed) Herman Oliphant,
HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

(Signed) Robert H. Jackson,
ROBERT H. JACKSON,
Assistant Attorney General.
Attorneys for Respondent.

604 [Clerk's certificate to foregoing transcript omitted in printing.]

605 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Stipulation and order as to certain exhibits

It is hereby stipulated and agreed by and between counsel for the petitioner and the respondent, respectively, in the above-entitled cause, that the printing of the following exhibits in the printed record herein be and the same is hereby waived: Petitioner's Exhibit 2 through 41, inclusive, and 57; Respondent's Exhibits B, D, E, F, T, and U.

It is further stipulated and agreed by and between counsel for the respective parties that the foregoing exhibits may and shall be taken and treated as physical exhibits and may and shall be taken and treated as part of the record in this cause as fully and completely as if printed in said printed record in their appropriate places and may be referred to by either party in his brief or briefs as fully as though set forth in said printed record.

It is further stipulated and agreed by and between counsel for the respective parties that the foregoing exhibits may be physically presented and submitted to the Court by either party for its consideration upon any argument or reargument or rehearing of this cause on this appeal or upon certiorari.

606 It is further stipulated and agreed by and between counsel for the respective parties that this stipulation shall be printed in the printed record.

It is further stipulated and agreed by and between counsel for the respective parties that this stipulation is subject to the approval of the Court and that any and all orders entered by the Court on or pursuant to this stipulation shall be included in the printed record.

This stipulation made and entered into this 31st day of August 1936, in the City of Washington, D. C.

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Petitioner.

(Signed) Herman Oliphant,
HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

(Signed) Robert H. Jackson,
ROBERT H. JACKSON,
Assistant Attorney General,
Attorneys for the Respondent.

So ordered September 3rd, 1936.

MANTON,
United States Circuit Judge.

607 *Petitioner's Exhibit No. 1*

NOVEMBER 8, 1929.

Memorandum to Mr. Nathan C. Lenfestey, Cashier

The Committee of Thirteen of the Conference Committee at a meeting to-day gave its consideration to the following matter which it respectfully desires to bring to the attention of the management.

In view of the low market price of National City Bank of New York shares at the present time, and our belief in the soundness of the stock and its attractiveness as an investment, particularly at current levels; it has been suggested that the Bank, upon application of its employees purchase outright such necessary shares, reimbursement to be made by monthly deducted instalments, stock to be held in trust until payment completed.

It is presupposed that a plan could be devised similar to the one operated in 1925 when the employees were given the privilege of purchasing stock payable in twenty-four monthly instalments. Also that the stock would be apportioned on the basis of one share to each $1,000.00 of salary, with perhaps supplementary provisions for those holding official or semi-official positions.

The Committee of Thirteen is of the opinion that any gesture on the part of the Bank to bring into its stockholding family,
608 those new employees and others who did not enjoy a participation in the offering of 1925, would redound greatly to the institution and its affiliated activities. We also feel that there are many who would like to increase their holdings but are not able to do so on an outright purchase.

On behalf of the Committee of Thirteen, may I assure you that your consideration of the foregoing will be greatly appreciated, and

needless to say I shall be happy to receive the privilege of discussing the matter with you.

Respectfully,

L. D. BLAKELY,
Chairman, Committee of Thirteen,
Conference Committee 1929–30.

L. D. BLAKELY,
Credit Department.

609

PETITIONER'S EXHIBIT NO. 42

December 29, 1930.

C. E. Mitchell.

18898

DEBIT Unclaimed Interest & Dividends
THE NATIONAL CITY BANK OF NEW YORK STOCK
January 2, 1931 dividend.

CHECK TO:
Mrs. E. Rand Mitchell

TICKET NO.
10,000 SHARES

Per Instructions from Mr. S. V. Baldwin.

Enclosed herewith please find check for the dividend on the above mentioned stock as referred to in our letter of above date.

$10,000.00

Very truly yours,

THE NATIONAL CITY COMPANY

By:

Form 1087
TREASURY DEPARTMENT
Internal Revenue Service
Revised January, 1919

OWNERSHIP CERTIFICATE—DIVIDENDS ON STOCK

FOR USE IN DISCLOSING ACTUAL OWNERSHIP OF STOCK ISSUED BY DOMESTIC AND RESIDENT CORPORATIONS

RECORD OWNER	ACTUAL OWNER
Name TAFF & COMPANY	Name MRS. E. REID MITCHELL
Street 55 WALL STREET	Address 55 WALL ST., NEW YORK CITY.
City NEW YORK State NEW YORK	Is the "Actual Owner" a nonresident alien?

Number of shares. Common stock 18,300. Preferred stock ..... Dividends received during 192 1, $18,300.00

Issuing corporation THE NATIONAL CITY BANK OF NEW YORK

Address 55 WALL ST, NEW YORK CITY

I HEREBY CERTIFY that the actual owner of the stock described above is to the best of my knowledge and belief as stated hereon, and that such owner has been advised to include the dividends reported above in his income tax return for the current year.

Date JANUARY 2, 192 1.

TAFF & COMPANY

(Signature of record owner)

42/2 44

611 *Petitioner's Exhibit No. 43*

APRIL 1, 1930.

C. E. MITCHELL, ESQ.,
55 Wall Street, New York, N. Y.

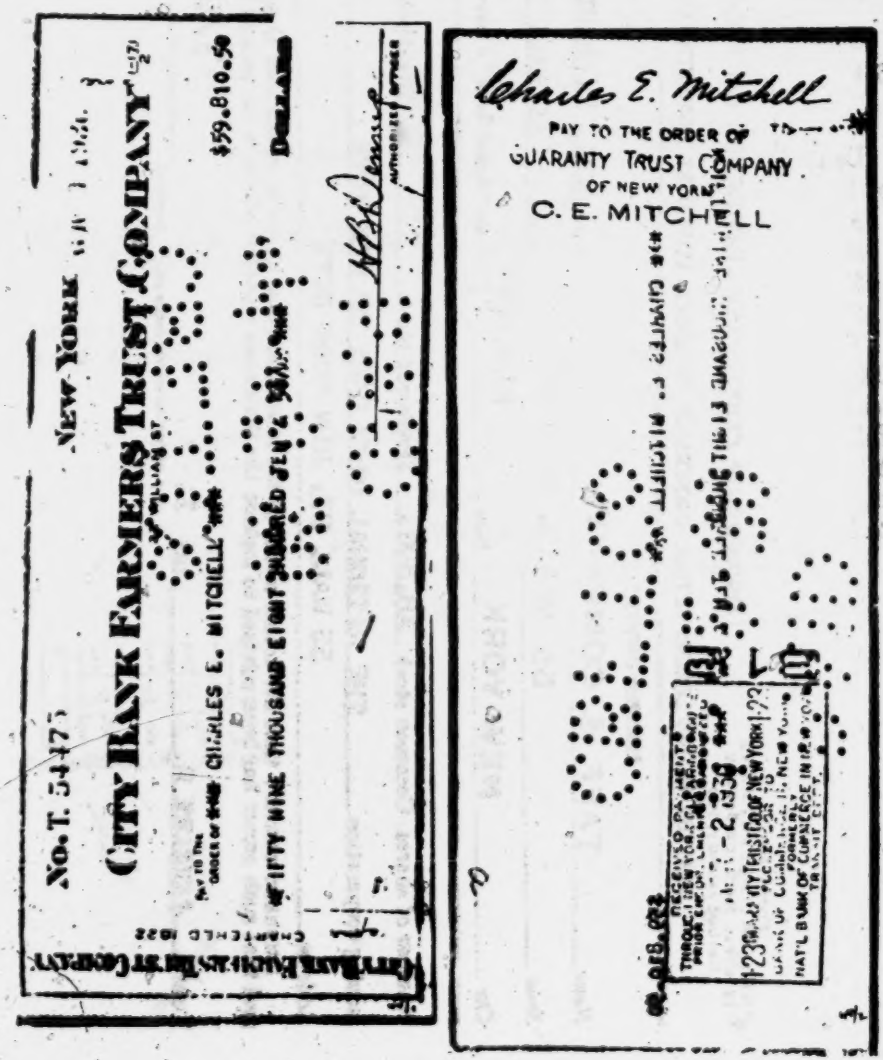
DEAR MR. MITCHELL: Upon the instructions of Mrs. Elizabeth R. Mitchell, we are charging her account with the sum of $59,810.50 and enclose herewith a check for that amount to your order. This is in payment of the interest on the loan which you are carrying in her behalf secured by 18,300 shares of National City Bank stock.

Yours very truly,

LINDSAY BRADFORD,
Vice President.

LB/MHD.
Enclosure.

612 PETITIONER'S EXHIBIT No. 44



613 *Petitioner's Exhibit No. 45*

C. E. MITCHELL,
55 WALL STREET,
New York, August 2, 1926.

DEAR ELIZABETH: There has been handed to me today for your account a check for $190,000, representing the proceeds of the sale of the property at #933 Fifth Avenue to Mr. Gordon S. Rentschler for $300,000, less $110,000, the amount of the existing mortgage.

Pursuant to our understanding, I will borrow from you the said amount of $190,000, to be returned in whole or in part on ten days' call, interest to be at the rate of five percent per annum.

Sincerely,

CHARLES E. MITCHELL.

Mrs. C. E. MITCHELL,
Care of Mr. E. F. BARRETT,
55 Wall Street, New York, New York.

614 *Petitioner's Exhibit No. 46*

JUNE 1ST, 1928.

DEAR MR. BARRETT: I have put into transfer to day in the name of E. Rend Mitchell the following securities:

200 shares General Motors common stock.
200 shares Johns Manville common stock.
500 shares Hershey convertible preference stock.
500 shares U. S. Realty & Improvement Co. capital stock.

These securities have a value of approximately $147,000 and $100,000 of this amount is in settlement of the principal amount of the loan of Elizabeth R. Mitchell to me, thus satisfying the said loan in full, interest to be adjusted. The balance is a gift from me to Mrs. Mitchell. Please forthwith sell for Mrs. Mitchell's account her holdings of Indiana Refining Company common stock, adding the avails to Mrs. Mitchell's cash awaiting investment.

Yours very truly,

C. E. MITCHELL.

135

Elizabeth R. Mitchell Special a/c Interest @ 3%

1926				1921			
March 3	Bonds sold to her per list	J10	125246 60	Dec 31	Balance		118993 34
				1922 March 3	Chem	4	6252 66
			125246 60				125246 60

Special Call loan account @ 5%

1926					1926			
Sept 15	Chem a/c	43	50000		Dec 31	a/c Sale of 933 5th Ave to Florida Realty Co		
1927								
May 4	" "	51	25000					
15	" for Interest		5541 67			Cash a/c equity	40	190000
July 20	" on a/c	53	15000			Mortgage paid	July	110000
			95541 67		Dec 31	Interest to date	48	5541 67
								305541 67

16
31
30
71

THE NATIONAL CITY BANK OF NEW YORK
55 WALL STREET
LOAN DEPARTMENT

1925 ED
T.R.D.

NEW YORK Aug 31. 1926

Chas E Mitchell
Loan to Chas E Mitchell @5%

INTEREST MEMORANDUM

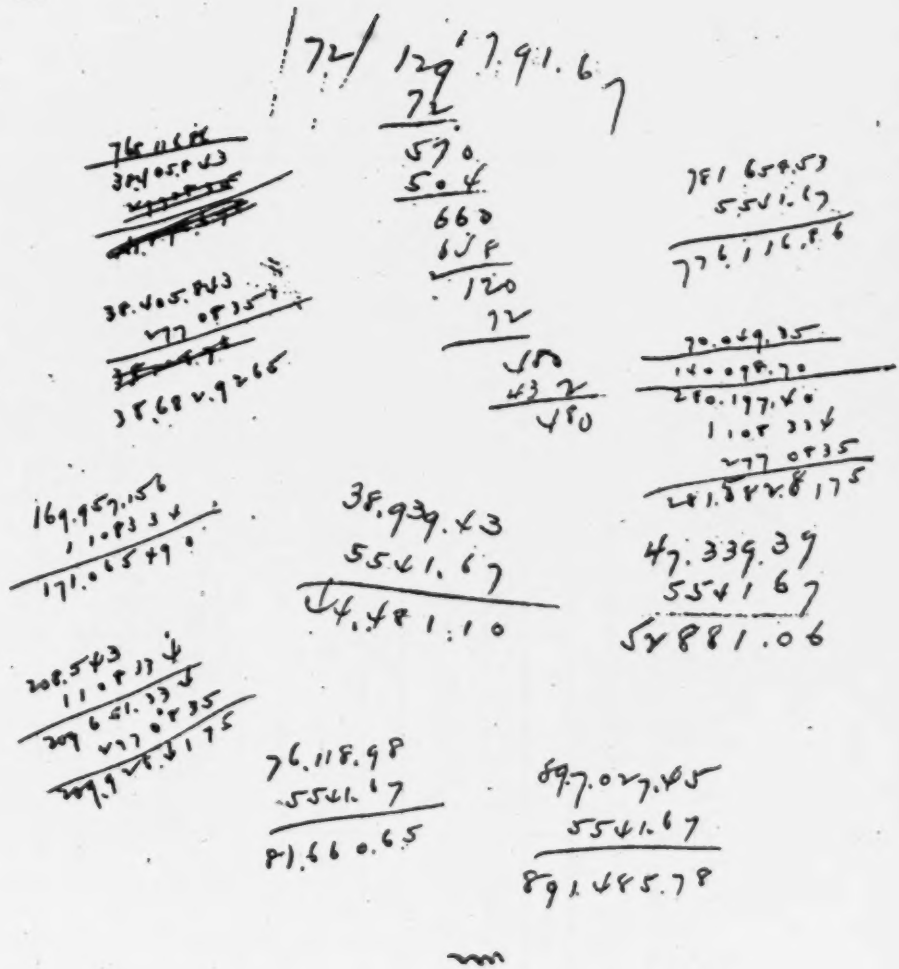
FOLIO	AMOUNT					TIME	RATE	INTEREST			
	300	000			Aug 2 – Sept 14	43 Days	5	1	791	67	
	450	000			Sept 14 – Dec 31	108 "	5	3	750	00	
								5	541	67	
								74720			

U.S. BOARD OF TAX APPEALS
ON DOCKET
MAY 2 1933
PETITIONER'S EXHIBIT
RECEIVED
48

Off. 7%

121 7

617



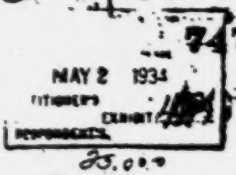
618

PETITIONER'S EXHIBIT No. 49

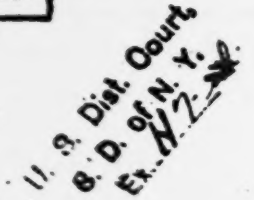
WW 15E
Memorandum for Mr Bennett

Ex 15E
Ltd

C&E 1 Call loan from Elizabeth R Mitchell



Dec 31. 1926	Balance loan		250.000
Feby 4. 1927	Paid on C	25.000	
July 20. 1927	do	15.000	
Dec 31. 1927	Balance	210.000	



Interest @ 5% 1927

Feby 4	35 days on	250.000	1215.28
July 20	166 " "	225.000	5187.50
Dec 31	164 " "	210.000	4783.33
	365 "		11186.11

C a/c Mitchell books to civil of E.R.M. in 1927
will should enter in her a/c as interest in 1927
& get check from C & E.M.

619

PETITIONER'S EXHIBIT No. 50

Interest Paid 1928

Jan	4	Farmers Loan & Trust Co	✓	1500
	6	J. P. Morgan & Co	✓	6250
	31	East River Savings Institution	✓	7500
Feby	14	Electric Bond & Share Co	✓	11357
April	18	Farmers Loan & Trust Co	✓	20000
May	1	East River Savings Inst	✓	5000
Dec	3	Farmers Loan & Trust Co	✓	34132.20
		~~Farmers Loan & Trust Co~~		
Sept	1	Farmers Loan & Trust Co		27111.51
				19801.27
Dec	21	Elizabeth A. Mitchell		10500
				30301.77

Notes mailed 11/14/29

620

PETITIONER'S EXHIBIT NO. 51

Ex. 3 Fin. Ex.

This exhibit to include high price during first six months of 1930.

CLOSING QUOTATIONS
NATIONAL CITY BANK STOCK

(Quotations from September 16 to September 30 taken from the New York "Times"; other quotations from Holt, Rose & Troster, New York City)

U. S. BOARD OF TAX APPEALS
DIV. ——— DOCKET 74720
ENTERED IN EVIDENCE
MAY 8 1934
PETITIONER'S EXHIBIT 51
RESPONDENT'S

1929		Bid	Ask
September	16	478	482
"	17	472	476
"	18	488	492
"	19	492	496
"	20	489	494
"	21	486	490
"	23	482	486
"	24	473	477
"	25	470	475
"	26	494	498
"	27	489	493
"	28	490	494
"	30	490	494
October	1	488	491
"	2	492	495
"	3	485	488
"	4	481	484
"	5	495	498
"	7	522	525
"	8	540	543
"	9	533	536
"	10	536	539
"	11	538	541
"	14	576	579
"	15	570	573
"	16	561	565
"	17	563	565

621

1929		Bid		Ask	
October	18	556	-	560	
"	19	540		545	
"	21	503		507	
"	22	526		529	
"	23	485		495	
"	24	468	-	475	
"	25	470		475	
"	26	460	-	465	
"	28	445	-	451	
"	29	~~425~~ 400	~~360~~	~~440~~	
"	30	410	-	425	
"	31	440	-	460	
November	1				
"	2	Exchange closed			
"	3				
"	4	390	395	410	405
"	6	305	-	325	
"	7	295	290	310	305
"	8	320	320	330	328
"	9				
"	10	Exchange closed			
"	11	284	280	295	290
"	12	200	-	215	
"	13	190	190	215	210
"	14	216	213	230	223
"	15	245	240	255	250
"	16	Exchange closed			
"	17	Sunday			
"	18	240	-	250	
"	19	240	-	245	
"	20	240	-	245	

622

1929			Bid		Ask
November	21		240	-	245
"	22		240	-	245
"	23	) Exchange closed			
"	24	) Sunday			
"	25		230	-	235
"	26		216	-	221
"	27		218	-	222
"	28	) Thanksgiving Day			
"	29	) Exchange closed			
"	30	) Exchange closed			
December	1	) Sunday			
"	2		215	-	220
"	3		221	-	224
"	4		221	-	225
"	5		235	-	238
"	6		241	-	244
"	7		248	-	252
"	8	) Sunday			
"	9		248	-	251
"	10		250	-	251
"	11		246	-	250
"	12		231	-	235
"	13		240	-	243
"	14		242	-	245
"	15	) Sunday			
"	16		233	-	237
"	17		232	-	235
"	18		228	-	231
"	19		221	-	224
"	20		212	-	214

623

1922		Bid	Ask
December	21	214 -	217
"	22) Sunday		
"	23	210 -	212
"	24	208 -	211
"	25) Christmas		
"	26	210 -	213
"	27	209 -	212
"	28	207 -	211
"	29) Sunday		
"	30	205 -	208
"	31	213 -	216
1930			
January	1	213	
February	1	225	
March	1	242	
April	1	244	
May	1	219	
June	1	196	
1932			
January	1	37	
February	1	47	
March	1	53	
March	24	43-3/4	44-1/4

Feb. 14, 1930 255 257

624 *Petitioner's Exhibit No. 52*

Summary of Loan With J. P. Morgan & Co.—Charles E. Mitchell

		Loans	Repayments
Oct. 30, 1929	Cash advanced	$3,634,274.00	
	Collateral received: 40,000 shs National City Bank.		
Oct. 31, 1929	Cash advanced	6,751,905.50	
	Collateral received: 18,300 shs National City Bank.		
Nov. 4, 1929	Cash received		$2,165,000.00
	Collateral released: 5,000 shs National City Bank.		
Nov. 7, 1929	Cash received		2,125,000.00
	Collateral released: 5,000 shs National City Bank.		
June 17, 1930	Collateral received: 5,000 shs National City Bank.		
June 25, 1930	Collateral received: 10,000 shs Anaconda Copper Mining Co.		
Nov. 10, 1930	Collateral received:		
	3,000 shs Alleghany Corp. Common.		
625	1,500 shs American & Foreign Power Corp. 2nd Preferred.		
	4,000 shs American & Foreign Power Corp. Optional Warrants.		
	200 shs Continental Illinois Bank & Trust Co.		
	3,000 shs International Telephone & Telegraph Corp.		
	5,000 shs United Aircraft & Transport Corp.		
	2,000 shs United Aircraft & Transport Corp. Preferred.		
	2,000 shs U. S. Realty & Improvement Co.		
	1,000 shs Wesson Oil & Snowdrift Preferred.		
Dec. 13, 1930	Collateral received:		
	1,000 shs International Telephone & Telegraph Corp.		
	1,500 shs American I. G. Chemical Corp.		
	2,000 shs P. R. Mallory & Co., Inc.		
626	500 shs Standard Brands, Inc.		
	500 shs U. S. Realty & Improvement Co.		
	500 shs United Aircraft & Transport Corp.		
	3,000 shs Pennroad Corp.		
	$50,000 International Telephone & Telegraph Corp. Cv. 4½% 1939.		
Dec. 26, 1930	Cash received		229,330.00
	Collateral released: 8,500 shs Anaconda Copper Mining Co.		
Dec. 17, 1931	Cash received		377,459.50
	Collateral released:		
	1,500 shs Anaconda Copper Mining Co.		
	3,000 shs Alleghany Corp.		
	1,500 shs American & Foreign Power Corp. 2nd Preferred.		
	4,000 shs American & Foreign Power Corp. Optional Warrants.		

627		200 shs Continental Illinois Bank & Trust Co. 4,000 shs International Telephone & Telegraph Corp. 5,000 shs United Aircraft & Transport Corp. 2,000 shs United Aircraft & Transport Corp. 6% Preferred. 2,500 shs U. S. Realty & Improvement Co. 1,000 shs Wesson Oil & Snowdrift Preferred. 1,500 shs American I. G. Chemical Corp. 2,000 shs P. R. Mallory Co., Inc. 500 shs Standard Brands, Inc. 3,000 shs Pennroad Corp.		
Dec. 18, 1931	Cash received			13,399.27
	Collateral released: $32,000 International Telephone & Telegraph Corp. 4½% 1939.			
628	Dec. 21, 1931 Cash received			7,192.50
	Collateral released: $18,000 International Telephone & Telegraph Corp. 4½% 1939.			
	Cash advanced		336,215.00	
	Collateral received:			
		3,000 shs Alleghany Corp. 1,500 shs American & Foreign Power Co. 2nd Preferred. 3,400 shs American & Foreign Power Co. Warrants. 1,500 shs American I. G. Chemical Corp. 1,500 shs Anaconda Copper Mining Co. 2,100 shs International Telephone & Telegraph Corp. 2,000 shs P. R. Mallory & Co., Inc. 2,700 shs Pennroad Corp. 500 shs Standard Brands, Inc. 5,500 shs United Aircraft & Transport Corp.		
629		2,000 shs United Aircraft & Transport Corp. Preferred. 2,500 shs U. S. Realty & Improvement Co. 1,000 shs Wesson Oil & Snowdrift Co. Preferred.		
Dec. 22, 1931	Cash advanced		38,759.65	
	Collateral received:			
		$47,000 International Telephone & Telegraph Corp. Cv. 4½% 1939. 1,900 shs International Telephone & Telegraph Corp. 600 shs American & Foreign Power Corp. Warrants.		
Dec. 28, 1931	Cash advanced		28,280.50	
	Collateral received:			
		200 shs Continental Illinois Bank & Trust Co. 300 shs Pennroad Corp. $3,000 International Telephone & Telegraph Corp. Cv. 4½% 1939.		

630	Dec. 30, 1931	Cash received		14,015.00
		Collateral released: 3,000 shs Alleghany Corp. 3,000 shs Pennroad Corp. 500 shs Standard Brands Inc.		
	Dec. 22, 1932	Collateral released: 200 shs Continental Illinois Bank & Trust Co. Collateral received: 200 shs Continental Illinois National Bank & Trust Co. of Chicago.		
	Jan. 4, 1933	Cash received		5,500.00
		Collateral released: 100 shs United Aircraft & Transport Corp. Preferred.		
	Jan. 4, 1933	Collateral received: Stock Purchase Warrants 2nd Series right to purchase 50 shs United Aircraft & Transport Corp. Common Stock @ $30 per sh (expires 11/38/.		
	Mar. 22, 1933	Cash advanced	5,750.00	
	Mar. 27, 1933	Cash advanced	30.42	
631		Bond & Mortgage of $500,000 dated March 2, 1931, on property located at 934 5th Ave.		
		Bond & Mortgage of $500,000 dated March 2, 1931, on property located at Tuxedo Park, N. Y.		
		Bond & Mortgage of $150,000 dated March 2, 1931, on property located at Southampton, N. Y.		
			10,795,215.07	4,936,896.27
		Balance May 17, 1933		5,858,318.80

631 *Petitioner's Exhibit No. 53*

Confidential Memorandum for Mr. Mitchell

We will report to the Commissioner of Internal Revenue, Washington, D. C., and to the New York State Income Tax Bureau, Albany, New York, that compensation in the amount of $510,629.28 was paid to you by this company during the year 1929. This is in compliance with the Income Tax Laws.

THE NATIONAL CITY COMPANY,
By S. W. BALDWIN,
Treasurer.

632 *Petitioner's Exhibit No. 55*

Losses for Federal income tax

Under the present statute and rulings, there is no reason why the tax deduction for a loss on the sale of securities held for over two years should be limited to 12½%. The loss can be made deductible in full from other income, regardless of the 12½% limitation, by first making a wash sale of the securities, repurchasing them within thirty days, and then selling them outright. The statutory provisions and rulings permitting that result are:

Under Section 118 (of the Revenue Act of 1928) no loss can be claimed for tax purposes on the sale of securities, where substantially the same property has been bought or sold within thirty days before or after the date of the sale. In the case of such wash sales, the securities reacquired take the same cost basis for tax purposes as the original securities, with adjustment for any difference between the sale price and the repurchase price (Section 113, a, 11).

The Treasury Department has ruled that, in the case of such wash sales, since there is an interval between the sale and the repurchase during which the taxpayer does not own the securities, the two-year period in the section relating to capital net gains and losses (Section 101 of the present Act) runs from the date of the repurchase of the securities and not from the date of the original purchase (I. T. 2443, VII-2 C. B. p. 127).

Accordingly, where a person has held securities for over two
633 years which he wishes to sell at a loss for tax purposes, he should first sell the securities and then repurchase them within thirty days (which can be arranged by an option or agreement to repurchase, if desired). Upon selling the securities after such repurchase, the owner will be entitled to use the cost price of the original securities (with the possible adjustment mentioned) and deduct the loss from his taxable income. Under the Treasury ruling above mentioned, the 12½% limitation does not apply, since the securities sold have not been held for over two years.

In considering that procedure, two points should be borne in mind: first, the possibility that the ruling may be revoked (though there do not appear to be any ground for revoking it), or that the statute may be amended (though it is not likely that such amendment would be retroactive to apply to 1931) second, on the wash sale, the transfer of the securities should be established beyond question, all stamp taxes on the sale of stock being paid, so that no question in that respect can be raised.

H. W. FORBES.

HWF:DES.

634 PETITIONER'S EXHIBIT No. 56

APR 27 1933

SHEARMAN & STERLING
ATTORNEYS AND COUNSELORS AT LAW
NATIONAL CITY BANK BUILDING
55 WALL STREET

NEW YORK December 13, 1929.

H. F. Mayer, Esq.,
Vice-President,
The National City Company,
52 Wall Street,
New York, N.Y.

Dear Mr. Mayer:

Pursuant to your request over the telephone, I have drafted a form of receipt along the lines discussed with you and Mr. Byrnes yesterday; and I am enclosing three copies of the draft.

Yours very truly,

Harry W. Forbes

HWF:DES
Encls.

635

~~RECEIVED on , 1929, from The National City Company $, of which $ represents my share for the year 1929 in the Management Fund and $ represents an overpayment to me, which is to be repaid by me from future additions to the said Management Fund, before I become entitled to any further payment therefrom.~~

APR 27 1933
GOVTS. EXHIB. 2

Received on July 1929. from The National City Company $
which represents an overpayment to me of my share for the 1929 Management Fund, and which is to be repaid by me from future additions to the said Management Fund, before I become entitled to any further payments therefrom. M-991

636 *Petitioner's Exhibit No. 59*

In the District Court of the United States of America, for the Southern District of New York

* * * * * * *

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for said district, upon their oaths present and charge that Charles E. Mitchell, hereinafter called the defendant, whose full and true name other than as herein stated is unknown to the Grand Jurors, heretofore, on to wit, the 15th day of March 1930, in New York County, in the State of New York, and within the Southern District of New York and within the jurisdiction of this Court (unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to wit, $728,709.84 upon his net income for the calendar year 1929), which tax was imposed by an Act of Congress approved May 29, 1928, entitled "An Act to reduce and equalize taxation, to provide revenue, and for other purposes," which act is known as the Revenue Act of 1928, which said unlawful and wilful attempt to evade and defeat said tax, was by the means and in the manner following, that is to say:

637 That the said defendant, during the calendar year ending December 31, 1929, was an individual, a citizen of the United States, who was married and living with his wife, and had, to wit, two dependents, and whose legal residence was in the County of New York, State of New York, within the Third Internal Revenue Collection District of the United States for the State of New York, and whose principal place of business was in the County of New York, State of New York, within the Second Internal Revenue Collection District of the United States for the State of New York, and who was a person required by law, after the close of the calendar year 1929, and on or before March 15, 1930, to make to the Collector of Internal Revenue for the Third Collection District aforesaid, or to the Collection of Internal Revenue for the Second Collection District aforesaid, under oath, a return for the calendar year ending December 31, 1929, stating specifically the items of his gross income and the deductions and credits allowed by Title I (Income Tax) of the said Revenue Act of 1928, by reason of the fact, which the Grand Jurors charge upon their oaths to be a fact, that the regular annual accounting period of the defendant was on the basis of the calendar year and not on the basis of a fiscal year, and by reason of the fact, which the said Grand Jurors upon their oaths charge to be a fact, that in said calendar year 1929, he, the said defendant, had and derived and received a gross income amounting to

more than $5,000, to wit, $3,649,623.93 derived as follows, that is to say:

638	Salaries, wages, commissions, and other compensation	$1,872,861.69
	Interest on bank deposits, notes, corporation bonds, and other interest (except interest on tax free covenant bonds)	140,105.47
	Profit from the sale of stocks, bonds, and other securities	1,391,906.37
	Dividends on stock of domestic corporations	235,457.50
	Taxable interest on Liberty bonds	4,789.12
	Director's fees	4,503.78
	Total gross income	$3,649,623.93

and that during the said calendar year 1929, the said defendant was entitled to and allowed by the provisions of said Title I of said Revenue Act of 1928, deductions in the sum of, to wit, $183,299.91, and no more, on account of the following:

Interest paid	$99,911.12
Taxes paid	68,703.79
Contributions	14,685.00
Total deductions	$183,299.91

and that he, the said defendant, had and derived and received for the said calendar year 1929 a net income, to wit, the gross income less the deductions allowed by law of, to wit, $3,466,324.02 upon which said net income of said defendant for said calendar year 1929, after allowance of all proper credits, an income tax of,
639 to wit, $728,709.84, under the provisions of said Revenue Act of 1928, became and was due by him, the said defendant, on to wit, March 15, 1930, to the United States of America, at least one-fourth of the amount of which should then and there have been paid by the said defendant to the Collector of Internal Revenue for the Third Internal Revenue Collection District aforesaid, or to the Collector of Internal Revenue for the Second Internal Revenue Collection District aforesaid; and that the defendant, on, to wit, the 15th day of March 1930, well knowing all the premises aforesaid, and being indebted to the United States of America in the amount aforesaid, by reason of the said tax imposed by the aforesaid Act of Congress, in the County of New York aforesaid, within the Southern District of New York and within the jurisdiction of this Court, then and there well knowing that the gross income and the net income had and derived and received by him during the said calendar year 1929 were as aforesaid, unlawfully did wilfully, knowingly, feloniously, and fraudulently attempt to evade and defeat a tax of to wit, $728,709.84 upon his said net income for the said calendar year 1929, in that he, the said defendant, well knowing all the premises aforesaid, did on, to wit, February 21, 1930, make a false and fraudulent income tax return for said calendar year 1929, and thereafter and on, to wit, March 15, 1930, did file and cause to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of the United States for the State of New York, said false and fraudulent income tax return

for the calendar year 1929, prepared as aforesaid, stating
640 specifically therein the items of his gross income for said calendar year 1929 to have been the sum of $134,400.26, and no more, derived as follows, to wit:

Salaries, wages, commissions, etc	$1,206,195.02
Interest on bank deposits, notes, corporation bonds, etc. (except interest on tax-free covenant bonds)	140,105.47
Dividends on stock of domestic corporations	262,874.40
Taxable interest on Liberty bonds, etc	4,789.12
Director's fees	4,503.78
Loss from sale of real estate, stocks, bonds, etc	1,484,067.53
Total gross income	$134,400.26

and stating specifically the items of deduction allowed by the Revenue Act of 1928 for said calendar year 1929 (other than deductions taken in arriving at gross income aforesaid) to have been the sum of $183,299.91, on account of the following, to wit:

Interest paid	$99,911.12
Taxes paid	68,703.79
Contributions	14,685.00
Total deductions	$183,299.91

and stating therein no other items of deductions and stating specifically the net income, to wit, the said gross income less the said deductions allowed by law for said calendar year 1929, to have been the sum of no dollars, and showing a loss of $48,899.65, and
641 showing the total tax due and payable by said defendant for said calendar year 1929, after allowance of all credits, to have been the sum of no dollars, and no more; and in that, on, to wit, March 15, 1930, the said defendant, in the aforesaid income tax return, wilfully, feloniously, fraudulently, and knowingly and with intent to defeat and evade an income tax in the sum of, to wit, $728,709.84, stated, claimed, and asserted that he had sustained, suffered, incurred, and had a loss from the sale of real estate, stocks, bonds, etc., in the sum of, to wit, $1,484,067.53, well knowing the fact, which the Grand Jurors upon their oaths charge to be a fact, that said statement, claim, and assertion was wholly false and untrue, and which he, the said defendant, then and there well knew to be wholly false, untrue, and fraudulent; and in that, well knowing all the premises aforesaid, the said defendant, on, to wit, March 15, 1930, in the aforesaid tax return, wilfully, feloniously, fraudulently, and knowingly and with intent to defeat and evade his aforesaid income tax for the calendar year 1929, falsely and fraudulently stated that he had received as gross income for the calendar year 1929 from Salaries, Wages, Commissions, etc., the sum of $1,206,195.02, and no more, then and there well knowing the fact, which the Grand Jurors upon their oaths charge to be a fact, that said statement was false, fraudulent, and untrue and that he, the said defendant, had and derived and received during the calendar year 1929 as Salaries, Wages, Commissions, and other compensation an amount in excess of $1,206,195.02, to wit, the sum of $1,872,861.69; and in that he, the said de-
642 fendant, having failed to pay the tax due as aforesaid in the

sum of, to wit, $728,709.84, or any part thereof, to the Collector of Internal Revenue for the Third Collection District aforesaid, after the close of the calendar year 1929 and on or before March 15, 1930, did on, to wit, March 15, 1930, and at all times thereafter up to the date of this indictment, fail and refuse to pay said tax, or any part of said tax, to the Collector of Internal Revenue for the Third Collection District aforesaid, or to any other proper officer of the United States; against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Section 146 (b), Revenue Act of 1928.)

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, present and charge that Charles E. Mitchell, hereinafter called the defendant, whose full and true name other than as herein stated is unknown to the Grand Jurors, heretofore, on, to wit, the 14th day of March 1931, in New York County, in the State of New York, and within the Southern District of New York and within the jurisdiction of this Court (unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to wit, $121,719.84 upon his net income for the calendar year 1930), which tax was imposed by an Act of Congress approved May 29, 1928, entitled "An Act to reduce and equalize taxa-
643 tion, to provide revenue, and for other purposes," which act is known as the Revenue Act of 1928, which said unlawful and wilful attempt to evade and defeat said tax, was by the means and in the manner following, that is to say:

That the said defendant, during the calendar year ending December 31, 1930, was an individual, a citizen of the United States, who was married and living with his wife, and had, to wit, two dependents, and whose legal residence was in the County of New York, State of New York, within the Third Internal Revenue Collection District of the United States for the State of New York, and whose principal place of business was in the County of New York, State of New York, within the Second Internal Revenue Collection of the United States for the State of New York, and who was a person required by law, after the close of the calendar year 1930, and on or before March 15, 1931, to make to the Collector of Internal Revenue for the Third Collection District aforesaid, or to the Collector of Internal Revenue for the Second Collection District aforesaid, under oath, a return for the calendar year ending December 31, 1930, stating specifically the items of his gross income and the deductions and credits allowed by Title I (Income Tax) of the said Revenue Act of 1928, by reason of the fact, which the Grand Jurors charge upon their oaths to be a fact, that the regular annual accounting period of the defendant was on the basis of the calendar year and not on the basis of a fiscal year, and by reason of the fact, which the said Grand Jurors upon their

oaths charge to be a fact, that in said calendar year 1930, he,
644 the said defendant, had and derived and received a gross income amounting to more than $5,000, to wit, $923,836.84 derived as follows, to wit:

Salaries, Wages, Commissions, and other compensation	$519,738.25
Interest on bank deposits, notes, corporation bonds, and other interest (except interest on tax free covenant bonds)	5,874.73
Interest on tax free covenant bonds upon which a tax was paid at source	17,500.00
Profit from the sale of stocks, bonds, and other securities	75,599.83
Dividends on stock of domestic corporations	297,220.37
Dividends on stock of foreign corporations	1,313.66
Director's fees	6,590.00
Total gross income	$923,836.84

and that during the said calendar year 1930, the said defendant was entitled to and allowed by the provisions of said Title I of said Revenue Act of 1928, deductions in the sum of, to wit, $299,198.95, and no more, on account of the following:

Interest paid	$268,175.09
Taxes paid	22,433.86
Contributions	8,590.00
Total deductions	$299,198.95

and that he, the said defendant, had and derived and received for the said calendar year 1930 a net income, to wit, the gross
645 income less the deductions allowed by law of, to wit, $624,637.89, upon which said net income of said defendant for said calendar year 1930, after allowance of all proper credits, an income tax of, to wit, $121,719.84 under the provisions of said Revenue Act of 1928, became and was due by him, the said defendant, on, to wit, March 15, 1931, to the United States of America, at least one-fourth of the amount of which should then and there have been paid by the said defendant to the Collector of Internal Revenue for the Third Internal Revenue Collection District aforesaid, or to the Collector of Internal Revenue for the Second Internal Revenue Collection District aforesaid; and that the defendant, on, to wit, the 14th day of March 1931, well knowing all the premises aforesaid and being indebted to the United States of America in the amount aforesaid, by reason of the said tax imposed by the aforesaid Act of Congress, in the County of New York aforesaid, within the Southern District of New York and within the jurisdiction of this Court, then and there well knowing that the gross income and the net income had and derived and received by him during the said calendar year 1930 were as aforesaid, unlawfully, did wilfully, knowingly, feloniously, and fraudulently attempt to evade and defeat a tax of to wit, $121,719.84 upon his said net income for the said calendar year 1930, in that he, the said defendant, well knowing all the premises aforesaid, did on, to wit, March 12, 1931, make a false and fraudulent income tax return for said calendar year 1930, and thereafter and on, to wit, March 14, 1931, did file and cause to be filed with the Collector of In-

646 ternal Revenue for the Third Internal Revenue Collection District of the United States for the State of New York, said false and fraudulent income tax return for the calendar year 1930, prepared as aforesaid, stating specifically therein the items of his gross income for said calendar year 1930 to have been the sum of $300,670.60 and no more, derived as follows, to wit:

Salaries, wages, commissions, etc	$519,738.25
Interest on bank deposits, notes, corporation bonds, etc. (except interest on tax-free covenant bonds)	164,291.74
Interest on tax free covenant bonds upon which a tax was paid at source	17,500.00
Dividends on stock of domestic corporations	274,555.37
Dividends on stock of foreign corporations	1,313.66
Director's fees	6,590.00
Loss from sale of real estate, stocks, bonds, etc	683,318.42
Total gross income	$300,670.60

and stating specifically the items of deduction allowed by the Revenue Act of 1928 for said calendar year 1930 (other than deductions taken in arriving at gross income aforesaid) to have been the sum of $292,118.20, on account of the following, to wit:

Interest paid	$268,175.09
Taxes paid	22,433.86
Contributions	1,509.25
Total deductions	$292,118.20

647 and stating therein no other items of deductions and stating specifically the net income, to wit, the said gross income less the said deductions allowed by law for said calendar year 1930, to have been the sum of $8,552.40, and showing the total tax due and payable by said defendant for said calendar year 1930, after allowance of all credits, to have been the sum of no dollars and no more; and in that, on, to wit, March 14, 1931, the said defendant in the aforesaid income tax return, wilfully, feloniously, fraudulently, and knowingly and with intent to defeat and evade an income tax in the sum of, to wit, $121,719.84, stated, claimed, and asserted that he had sustained, suffered, incurred, and had a loss from the sale of real estate, stocks, bonds, etc., in the sum of, to wit, $683,318.42, well knowing the fact, which the Grand Jurors upon their oaths charge to be a fact, that said statement, claim, and assertion was wholly false and untrue, and which he, the said defendant, then and there well knew to be wholly false, untrue, and fraudulent; and in that he, the said defendant, having failed to pay the tax due as aforesaid, in the sum of, to wit, $121,719.84, or any part thereof, to the Collector of Internal Revenue for the Third Collection District aforesaid, after the close of the calendar year 1930 and on or before March 15, 1931, did on, to wit, March 15, 1931, and at all times thereafter up to the date of this indictment, fail and refuse to pay said tax, or any part of said tax, to the Collector of Internal Revenue for the Third Collection District aforesaid, or to any other proper officer of the United

States; against the peace and dignity of the United States of
648 America, and contrary to the form of the statute in such case made and provided. (Section 146 [b], Revenue Act of 1928.)

GEORGE Z. MEDALIE,
United States Attorney.

A True Bill.

----------,
Foreman of the Grand Jury.

Petitioner's Exhibit No. 60

UNITED STATES
vs.
CHARLES E. MITCHELL

NEW YORK, *June 21st, 1933.*

Trial Resumed

Charge of the Court

GODDARD, *J.*

MR. FOREMAN AND GENTLEMEN OF THE JURY:

First, I wish to express the Court's sincere appreciation of the careful and intelligent attention which you have given to the
649 case throughout the trial. It has been presented by exceptionally able counsel, and although the evidence is not simple, although it includes many details and documents, the principal issues which you are called upon to decide are, I believe, well understood by you. I shall state the rules of law which apply and shall refer to some of the evidence for the purpose of aiding you in the application of the law.

There are two counts or charges in this indictment. The First Count charges that the defendant wilfully and with intent to defeat and evade income taxes due from him to the United States Government for the year 1929 took a deduction of $2,879,000 on his income tax return in connection with an alleged sale of 18,300 shares of National City Bank stock to Mrs. Mitchell. It is in effect charged that the defendant merely went through the form of a sale which was not in fact a real sale, for the purpose of evading income taxes on income actually received by him. This Count also charges that the defendant wilfully omitted from his 1929 income tax return, for the purpose of evading income taxes due from him to the United States Government, the sum of $666,666.67 which he received as income from the Management Fund of the National City Bank in the year 1929.

Count Two of the indictment charges that the defendant wilfully, and for the purpose of evading and defeating income taxes due from him, took a deduction of $758,000 on his income tax return for the year 1930, founded on an alleged sale of 8,500 shares of Anaconda

Copper stock to W. D. Thornton, thus wiping out his taxable income for that year. It is charged that the sale to W. D. Thornton
650 was a mere pretense gone through for the purpose of evading income taxes and was not a real, final, and unconditional sale.

It is not disputed that the defendant took the deduction in connection with his claim of a sale to Mrs. Mitchell or that he omitted the item of $666,666.67 from his income tax return for 1929, nor is it disputed that he took the deduction of $758,000 on the claim of a sale to W. D. Thornton, on his income tax return for 1930. The issue is whether these deductions and this omission were unwarranted, and if so, whether they were made wilfully, fraudulently, and with intent to defeat and evade income taxes due by the defendant to the United States Government.

An indictment is a mere accusation. It is not evidence. It sets forth the charges upon which the defendant is being tried. In criminal cases, in order to find a verdict of guilty, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt. Another way of putting it is that a defendant is presumed to be innocent and this presumption holds good until displaced by proof of guilt beyond reasonable doubt. A reasonable doubt means a doubt founded upon reason. A doubt for which you can give a reason. A substantial doubt, or a fair doubt. It does not mean a fanciful doubt; a capricious doubt or a possible doubt. It does not mean a doubt created by the reluctance upon the part of a jury to perform an unpleasant task. It is practically impossible for a person to be absolutely and completely sure of any controverted fact which by its nature is not susceptible of mathematical proof or certaintly Therefore, the rule of law in a criminal case is that it is sufficient if
651 proof of a defendant's guilt is established beyond all reasonable doubt, not beyond all possible doubt. A reasonable doubt is such a doubt as a reasonable man would entertain after a comprehensive and careful review and consideration of all the evidence, of all the facts and circumstances brought to his attention. The rule of reasonable doubt applies to each of the charges on which the defendant is being tried in every essential element of the crime as charged.

The citizens of this country have established a Government to provide for their common defense, protection of their property and general welfare. To maintain the Government it is necessary to raise funds. This is done by various forms of taxation. One of the plans for obtaining the needed revenue is the income tax which is a graded tax based upon the income of the taxpayer. The idea which Congress undoubtedly had in mind was that a person with extensive property interests which produce a large income subjects the Government to a greater outlay in protecting and caring for those properties and is, therefore, fair that such person should be required to bear a proportionate part in defraying the expense of carrying on the operations of the Government.

Few tax laws are popular. Congress may enact laws for the purpose of raising the needed revenue but experience has taught many of us that while Congress may pass laws and Courts interpret them—in the final analysis it is the jury frequently who actually deal with the enforcement of these laws, for it is the jury which decides just how its members view the facts in each particular case.

652 In situations such as we are now concerned with a mere depreciation in securities held by a person does not come within the statute so as to entitle the holder to a reduction in his income tax return for the diminished value of his holdings. To entitle that person to claim a loss there must be a sale and it must be a genuine sale, and although formal papers are signed and exchanged between them, if there is an understanding and intention that actual ownership and control shall not pass, there is no sale and the formalities are mere gestures without effect.

The statute with which we are now concerned is known as the Revenue Act of 1928. That Act provides in substance that a deduction from gross income may be made for a loss on the sale of securities, but it must be an actual bona fide sale, and a deduction may not be claimed if the taxpayer within thirty days of the sale has entered into a contract or option to repurchase or to purchase the same or similar securities except under certain conditions we are not now concerned with.

The criminal law does not punish innocent mistakes, inadvertent errors, or mere negligence. Under each of the counts the accusation is that the defendant acted wilfully, that is, purposely or knowingly and not carelessly, in what he did in regard to his income tax for these two years. Before finding him guilty, you must be satisfied from the evidence that he did act wilfully, fraudulently, and intentionally.

In a case of this kind, it is difficult or impossible to procure direct evidence of the intent of the defendant when he performed certain acts alleged to constitute crimes. Thus, to prove any

653 one of the offenses charged in this case, the intent alleged in the indictment must be shown, but direct testimony is not necessary to prove this intent. The intent with which an act is done is a state of mind which must be determined by reasonable inferences from the facts proved. It is obviously impossible to ascertain or prove directly what were the operations of the mind of the defendant in this case, on the dates on which it is alleged the offenses charged in this case were committed.

Of course, you cannot look into a person's mind and see what his intentions are or were. But a careful and intelligent consideration of the facts and circumstances enable us to draw with a reasonable degree of accuracy what another's intentions were in doing or not doing certain things. With a knowledge of definite acts we may draw definite logical conclusions. We are in our affairs continually called upon to decide from actions of others what their intentions or purposes are. And experience has taught us that frequently actions

speak more clearly than spoken or written words. You must, therefore, rely in part on circumstantial evidence in determining the guilt or innocence of this defendant.

Circumstantial evidence is entitled to such consideration by you as you find it deserves, depending upon the inferences you think it necessary and reasonable to draw from such evidence. No greater degree of certainty is required when the evidence is circumstantial than when it is direct, for in either case the jury must be convinced of the defendant's guilt beyond a reasonable doubt. The law makes no distinction between direct evidence of a fact and evidence
654 of circumstances from which the existence of a fact may be inferred.

If all the circumstances taken together are consistent with any reasonable hypothesis which includes the innocence of the defendant, the Government has not proved his guilt beyond a reasonable doubt and you must acquit him. On the other hand, if you find that all of the circumstances established by the evidence in this case, taken together, satisfy you beyond a reasonable doubt of the defendant's guilt on any one or more of the charges, it is your duty to find the defendant guilty with respect to such charge or charges.

Circumstantial evidence, when it is strong and convincing, is often the most satisfactory evidence from which to draw conclusions as to the guilt or innocence of a defendant.

Different inferences, however, may be drawn from the facts and circumstances in the case. The Government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you to decide, and for you alone, which inferences you will draw; whether you will draw those tending to support the sales as valid and bona fide ones or those tending to show that the sales were only pretenses and shams.

In this case there is a great deal of evidence for you to consider, and it is your duty to weigh and determine the value of the facts and circumstances and testimony introduced by the Government on the one hand and by the defendant on the other. You have, of course, the right to believe the defendant's denials of wrongful intent, and if you do believe them, it is your duty to acquit
655 him. You also have the right to disbelieve his testimony in this respect, either in whole or in part, and to determine what his intent really was, by making all reasonable deductions from the facts and circumstances which you find have been proved in this case. In other words, you may find that the facts and circumstances are in harmony with the defendant's own testimony as to what his intent was and that they confirm his declarations of intent, or you may find that the defendant's acts and the facts and circumstances of the case disagree with his declarations of intent and that they speak louder than his words. It is for you to determine which you find to be the most convincing.

I wish to impress upon you so that there will be no uncertainty about it that where either the Court or counsel at any time attempt

to relate testimony or to refer to it, and any such reference or relation of the testimony differs from your own recollection of it, you are to disregard such statements of the testimony and follow your own recollection, for you are the sole judges of the facts. If my memory of the facts differs from yours—adhere to your own recollection. And should I not mention evidence which you think is important, and that is not unlikely for I cannot cover it all, you should be guided solely by your views of the evidence as it impressed you. It is also quite possible that I may refer to some evidence that you feel has little significance. Any reference to the testimony is made by me only in an effort to aid you in applying the law.

Now, gentlemen, taking up the first transaction mentioned in the indictment—the one between the defendant and his wife in-
656 volving the alleged sale by him to her on December 20, 1929, of 18,300 shares of the National City Bank stock at the stated price of $212 per share, and the alleged repurchase by him from her of this same stock at the same price, to wit—$212 per share on March 24, 1932. I shall not repeat all the details. The details of this transaction have been fully discussed two days by counsel and I think they are fresh in your minds.

The defendant has testified that he made this sale to his wife because he feared that if he sold it in the open market, it would have a serious effect on the National City Company and the bank, and upon the stock held in the employees' fund of the company and that desiring to register his loss for tax purposes—namely the difference between the average cost of $367 per share and the prevailing price of $212 per share—he sold the stock to his wife in good faith.

The ultimate problem for you to decide, in determining whether or not the defendant was entitled to make a deduction from his 1929 return on account of any loss suffered by reason of his sale of National City Bank stock to Mrs. Mitchell, is whether or not that sale was or was not a bona fide sale or only a form and a pretense. A sale may be for cash or on credit as all business men know, but to have a bona fide and valid sale the parties must make a genuine transfer—the seller for the purpose of getting rid of the stock absolutely, and the buyer for the purpose of acquiring it absolutely as his or her own, without any condition covering its later return to the seller and without any understanding between the parties qual-
657 ifying the definite and irrevocable quality of the sale. The mere receiving by the seller of a credit for the price and the receiving by the buyer of the legal title, without intent on the part of the seller to complete an absolute sale, cannot constitute a basis for a deduction for loss under the provisions of the tax law.

Mrs. Mitchell is not charged with any crime in this case and it is not an issue whether or not Mrs. Mitchell understood the purpose for which the defendant proposed this transaction with her. It is immaterial whether Mrs. Mitchell had any intention or understanding with reference to the alleged attempt by the defendant to defeat and evade income taxes. The only issue which affects Mrs. Mitchell

is as to her understanding with her husband. You cannot convict the defendant unless you find either that there was an understanding between him and his wife that this sale was not a genuine, final and conclusive sale or else that the defendant knew Mrs. Mitchell was in effect a mere nominee in this transaction, who would purchase and resell the stock to the defendant at his behest. If you are, on the other hand, satisfied that the defendant and his wife understood that this was merely a sale of convenience, not actually transferring genuine ownership and control of the stock to Mrs. Mitchell, or if you find that Mrs. Mitchell was in effect a nominee in the transaction who acted and would continue to act as her husband requested, so that the real control of the stock remained in her husband and that he so intended the transaction, then you may find that the sale was only a sham.

It is not disputed that the alleged sale of National City
658 Bank stock was made with the express purpose of wiping out the income listed in the defendant's 1929 return to the end that he might not be required to pay any tax. The desire to minimize tax liability is perfectly lawful if it is carried into effect by legal means. Nevertheless, if you find from the evidence that the defendant, in going through the form of a sale to his wife, was led to do so by a desire to escape taxation, you may take that fact into consideration, together with all the other evidence, in determining whether the sale was real or whether it was a sham.

No transfer tax stamps were affixed to any documents evidencing the sale. This omission has been explained by testimony on behalf of the defendant as a mere inadvertence. It will be your duty to decide whether it was inadvertent or deliberate and to draw from the fact as you find it such inference as you consider warranted.

The defendant is not charged with any crime for failing to affix transfer stamps, the sole relevancy of that omission in this case being such light as it throws on the intention of the defendant to make or not to make a genuine sale.

Mrs. Mitchell's purchase of the National City Bank stock was made on credit. As to this there is no conflict whatever in the testimony of Barrett and Kunkel that the total value of all of Mrs. Mitchell's securities, cash and real estate, on December 20, 1929, the date of the purchase, was above $945,000, a sum slightly under 25% of the total purchase price of the stock. The defendant said he thought she
659 was worth over a million. Her cash resources amounted to only $32,000, against a purchase price of $3,879,000. There is testimony on the part of the defendant tending to explain the inference of bad faith which the Government asks you to draw from this fact. The defendant has testified that neither he nor Mrs. Mitchell regarded this disproportion between her assets and the size of the obligation to the defendant which she assumed in connection with the transaction, as being of any importance, for the reason that it was the intention of both of them that she should hold the stock for a few months only, that they both confidently expected that she

would be able, within a short period, to sell the stock at a handsome profit, and that it never occurred to him as a possibility that the stock would do more than take a temporary dip under the price at which it was sold to Mrs. Mitchell. It will be for you to weigh the value of this testimony, and after weighing it, in connection with the other testimony, to draw such inference as you deem proper.

At the date of the sale the stock sold was pledged to J. P. Morgan & Company as part of the security against the loan which Mr. Mitchell was carrying with that firm of bankers. After the sale, just as before, the stock remained with J. P. Morgan & Company as part of the security for the defendant's loan and they were not notified of the sale, although Mr. Forbes had suggested to Mr. Mitchell on one or more occasions that this should be done. But Taff & Company, in whose name the stock was carried were notified to send the dividend checks to Mrs. Mitchell's representative.

Contrary to the defendant's expectations, as he has testified
660 they were, the National City Bank stock which he had sold, after increasing in value for a time, turned out to be a burden instead of a profitable investment or speculation. During the period from December 20, 1929, to the end of 1932, the defendant made gifts to his wife which totalled a sum very close to the amounts of interest paid by Mrs. Mitchell during the life of her obligation to the defendant, less the amount of the dividends on the stock received by her during the same period. The gifts were made in many instances, according to the testimony and the documents in the case, at about the dates when payments of interest on Mrs. Mitchell's obligation were due and when her cash account at City Bank Farmers Trust Company, which had the management of her personal fortune, was overdrawn or when securities in her account at that institution had been liquidated for cash.

There is in evidence a memorandum dated October 2nd, 1931, addressed to the defendant's secretary, Mr. Sweeney, containing a statement of interest payments made by Mrs. Mitchell and of dividends and gifts from the defendant received by her, which shows that the former had exceeded the latter over a certain period by $33,000. This sum is stated on the memorandum to be "difference due Mrs. Mitchell." The defendant admits that he requested that a memorandum substantially in this form be procured by his secretary Sweeney from Peterson of the City Bank Farmers Trust Company. He has testified, however, that the words "difference due to Mrs. Mitchell" were not requested by him. There is no disputing the
661 testimony that the defendant received the memorandum from Sweeney. Nor does it appear that the defendant made any criticism of the form of the paper at the time. The evidence shows that shortly after the date of this memorandum which showed a "difference" of $33,000, a gift of $25,000 was made by the defendant to Mrs. Mitchell.

There is also in evidence a memorandum dated August 11, 1932. This memorandum, according to the testimony, was also requested

by the defendant and received by him. In the case of this memorandum, as in the case of the preceding one, the defendant has testified that he did not ask for any "difference." He admits receiving the memorandum. This memorandum was dated several months after the date in March when the defendant repurchased the National City Bank stock from Mrs. Mitchell. In it are set forth all payments of interest made by Mrs. Mitchell since January 1, 1931, as well as a statement of all dividends and gifts from the defendant which had been received by her since that date. It, too, states a difference, namely, $9,750, by which the interest payments exceeded the sum of dividends and gifts. The same day this memorandum was prepared, the defendant made a $5,000 gift to Mrs. Mitchell and within a month a second payment of $5,000.

The defendant, on cross examination, admitted that these gifts were made so that Mrs. Mitchell would be able to pay the interest on the date due to the defendant. The Government contends that the true effect of these circumstances, looking through the form to the substance, was that the defendant, after December 20, 1929, really received the dividends on the 18,300 shares of stock, and that
662 Mrs. Mitchell really paid no interest on any obligation. You may consider the making of these gifts to Mrs. Mitchell as a circumstance in your determination of the question whether there was a real unconditional sale to Mrs. Mitchell, or whether there was a mere pretense of a sale followed by a pretense of paying interest, which was in fact provided by the defendant for payment to himself.

The defendant, on the other hand, has testified that the gifts were made in good faith for the purpose of aiding Mrs. Mitchell to make the interest payments and to avoid depleting the corpus of her estate.

There is also testimony to the effect that in March of 1932, the defendant asserted a claim against the National City Company for the difference between the net cost to him of the 18,300 shares which he claims were sold to his wife, and the market value of the stock in March of 1932, which was between $40 and $50 per share. The Government has contended that this shows the defendant always regarded the stock as his own and never treated it as if it had been sold to Mrs. Mitchell for $212 a share, reasoning that if he regarded the sale as a real one he would not have made a claim that he had lost any more than the difference between the price he paid and $212 a share, the price shown in the letters of December 20, 1929. Against this the defendant has testified: first, that he made no specific claim but merely asked for consideration from the Board of Directors; and, secondly, that the claim which he presented in writing was an opinion of counsel who advised him that he was entitled to
663 claim the entire loss and not merely the difference between the cost to him and the price of $212.

You may consider, as a circumstance bearing on the defendant's intent with respect to the transaction with his wife and the claimed deduction dependent thereon, the fact that on March 24, 1932, the

defendant repurchased from Mrs. Mitchell the identical stock which he had sold her on December 20, 1929, at the original purchase price, although the market then was less than $50 a share, and that in so doing he expressly forgave the debt due from her according to the terms of the letters exchanged on December 20, 1929. The defendant testified in connection with the repurchase, that it was done on advice of counsel who were acquainted with the facts. He also testified that it was done for the purpose of protecting Mrs. Mitchell's estate from the loss suffered through her purchase of the stock, and that the repurchase was effected at that time in order to avoid the imposition of gift taxes, legislation concerning which was then pending in Congress.

All the facts and all the circumstances should be considered by you in reaching your ultimate conclusion as to whether the transaction of December 20, 1929, was an actual sale made in good faith or was a mere pretense for the purpose of attempting to defeat and evade payment of the tax due to the Government. In deciding this question, you should ask yourself whether all the circumstances taken together do or do not run counter to the defendant's own testimony that he intended the sale to be an absolute one without any reservations whatever. In other words, you should consider, in the
664 light of your experience and knowledge of ordinary business affairs, as well as in the light of the defendant's business experience and background whether a bona fide sale would ordinarily be accompanied by and followed by the facts and circumstances which you find to be shown by the evidence in this case.

The defendant has testified that he acted in reliance upon advice of counsel in effecting the transaction of December 20, 1929, with Mrs. Mitchell, and in making the claim of deduction on his 1929 return, founded upon that transaction. The testimony is that on December 20th, the defendant consulted with Mr. Harry W. Forbes, a tax attorney, of the firm of Shearman & Sterling. The defendant contends that pursuant to the advice Forbes gave him, he made a sale to Mrs. Mitchell and claimed a deduction on the basis of such sale upon his 1929 tax return, being informed by Forbes that such a claim of loss would be legal.

The defendant has also offered the testimony of Garrard Winston, an attorney, to show that in omitting the $666,666.67 item from his 1929 income tax return he was relying upon the advice of counsel. In this connection I wish to advise, and do advise you that if a man fully and honestly lays all the facts with respect to a contemplated act before his counsel and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he may not be convicted of a crime which involves, as the crime here charged does involve, wilful and fraudulent intent. This is the rule even if such advice was an
665 inaccurate construction of the law. But on the other hand, no man can wilfully and knowingly violate the law and excuse himself from the consequences thereof merely by pleading that in doing the act he followed the advice of counsel.

If the defendant made a full, complete and frank disclosure to his counsel of all the facts, which the defendant may reasonably be expected to have deemed material in the light of his background and experience, and in good faith acted pursuant to that advice, you must find that he did not have the intent to commit the crime charged.

If you find that Mrs. Mitchell was entering into a transaction involving $3,875,000 when she was worth only $940,000; that the defendant intended to make gifts to his wife so she could meet the interest payments to him on the purchase price; that the defendant intended to repurchase the stock at the same price; that the defendant intended to forgive the debt if the stock declined in price, and you find that these were relevant and the defendant may have reasonably deemed them important and material, but did not communicate these facts to Mr. Forbes, you may then find that the defendant did not fully advise his lawyer and therefore is not in a position to rely upon advice of counsel as a defense in this matter.

Transactions between husband and wife are perfectly legitimate, as you know, but when the rights of third parties are effected, they are naturally subject to careful scrutiny. I think you have understood from the rulings of the Court during the trial but so that you may have no doubt about it I will remind you that in the
666 Federal Courts neither the Government nor the husband may call as a witness the wife of the defendant in a criminal trial. The Supreme Court holds that to do so would be contrary to public policy and for reasons that are probably obvious to you. Therefore, you are not to draw any inference favorable or unfavorable to the Government or to the defendant because she is not a witness.

I believe it is clear to you all that whether the defendant bought the 28,300 shares which include the 18,300 shares referred to for the purpose of benefiting the National City Bank, or whether he purchased them solely because he would derive benefits therefrom, directly or indirectly, or whether he bought the stock for the mutual benefit of himself and the bank, has nothing whatsoever to do with the issues in this case. It is agreed that the cost to the defendant of this stock was an average of about $367 a share. The only issues are whether the defendant is guilty or innocent of the charges in the indictment, and whether the salary and other compensation which the defendant received from the National City Bank and the National City Company was a large amount is not a matter with which we are here concerned.

We now come to the money received by the defendant from the "Management Fund."

The Government charges that the defendant wilfully and fraudulently omitted from his income tax return for the year 1929 the sum of $666,636.67, which he received from the Management Fund of the National City Company on July 1, 1929, knowing that money to have been income to him during that year. It is not dis-
667 puted that the defendant received the money, and it is not disputed that he has not paid it back. The only questions for you to decide are whether, in accordance with the law as I shall give

it to you, this money was income, and whether the defendant, knowing it to be income, wilfully left it out of his income tax return with intent to evade payments of income tax.

Income includes all interest, dividends, profits, money received by a man as salary, earnings, or as compensation for personal services. Gross income means all such income, and net income means the gross income less certain deductions which are specified in the law, including established losses on securities.

On July 1, 1929, the defendant received a check to his order for $666,666.67. He did not report this income on his return for the year 1929 and did not pay a tax on it. The check represented the defendant's share (one-third) of a distribution from the "Management Fund" of the National City Company paid to executive officers of the company from moneys credited to that fund during the first six months of 1929. The "Management Fund," from which the payment was made, was established by a standing resolution of the Board of Directors of the Company in January 1927, continued in effect without change by a resolution of January 1929.

Pursuant to the resolution, an amount figured at the rate of 8% per annum on the average quarter year aggregate of Capital, Surplus, and Undivided Profits was deducted each month from "Current Earnings," and 20% of any remainder of such Current Earnings for the month was credited to the Management Fund.

668 The Executive Committee was empowered to make distribution of the Management Fund to executive officers at the close of the year, or at any time, or from time to time during the year. The resolutions did not provide for charging the fund if the company sustained net losses from operations for any month. During the last six months of 1929, the National City Company sustained severe financial losses and the Management Fund accounts showed that there were no accruals to the credit of the fund from operations over that period.

It appears from the testimony of the witness Baker that some time prior to December 20, 1929, he discussed with the defendant the proper manner of treating the July payments, since the earnings of the Company had suffered severely in the last quarter of that year. It also appears that before December 20, 1929, the defendant discussed with Baker how this payment was to be treated.

About December 13, 1929, the form of the paper to be signed by the officers was prepared and distributed to the officers for signature. The paper signed by the defendant, which bears no date, reads as follows:

"Received on July 1, 1929, from the National City Company, $666,666.67, which represents an over-payment to me of my share for the year 1929 in the Management Fund, and which is to be repaid by me from future additions to the said Management Fund, before I become entitled to any further payments therefrom.

"C. E. MITCHELL."

In December 30, 1929, the Board of Directors met and adopted the method of handling this item set forth in this paper.

The Government urges you to find from this evidence that the defendant, at the end of the year 1929, had no intention of repaying the money he had received and that he knew that the paper he signed merely limited his right to take further moneys from the future additions to this fund, if any, until after $666,666.67 had come into the Management Fund in later years to the credit of the defendant, and been applied against the July 1929 payment. The defense contends that the receipt simply acknowledged obligation to repay by one particular method, but did not prevent the existence of an absolute and unconditional debt, which the defendant has testified he considered himself as owing.

In resolving these conflicting claims, you may take into consideration, along with other evidence, the evidence which has been introduced concerning subsequent acts of the defendant and of the Board of Directors of the National City Company, with regard to the Management Fund payment and its treatment by the Board and the company.

It is not an issue in this case whether or not the acts of the defendant or the board of directors after March 15, 1930, were right or wrong; or whether or not the defendant was right or wrong in failing to repay the amount received by him or not making any effort to collect from the other officers the sums they received, or in raising the salaries of the officers in 1931, or in distributing in that year the balance of the 1928 management fund.

Evidence as to these subsequent acts is to be considered by you only to the extent that it may throw light upon the question as to the intent and understanding of the defendant, at the end of 1929.

On December 30, 1930, the defendant read to the Board of Directors of the National City Company a memorandum which he had prepared in advance, referring to the payment of July 1, 1929, as an advance and quoting the receipt signed by the officers. The defendant stated in his memorandum that it was "considered that for that year the officers had received in midyear an advance payment on account of an expected credit in Management Fund which had failed to develop" and that the books of account had been debited with that sum "with the understanding, however, that such debits should be wiped out by and only by credits to which" the officers "might become entitled from Management Fund accruals in future."

The memorandum from which the defendant read also contained a resolution which provided "that the payments made to eligible officers out of the Management Fund accruals in July 1929 shall continue to be considered as advances" and that "amounts so advanced will be continued as 'debts owing' by the officers to whom such advances were made, payable only, however, from amounts which may be dis-

tributed to such officers from future accruals in Management Fund account."

Since this memorandum referred in two places to the intention of the Board as it existed in December 1929, and since that intention is stated to have been that these sums were repayable only out of
671 Management Fund, the Government asks you to conclude that this memorandum does in fact state what the defendant understood to be the meaning of the resolution of December 1929, and the receipt which he had signed. In other words, the Government contends that when the defendant wrote this memorandum, he stated exactly what the Government claims he understood in December 1929; that is, that the 1929 payment was only to be repaid, if at all, only out of future Management Funds.

Against this the defendant has testified that he regarded the 1929 payment as an absolute, unconditional debt. Furthermore, Mr. Winston has testified that he collaborated with the defendant in the preparation of this memorandum and that the word "only" was inserted inadvertently.

As a matter of law, the insertion of the word "only" in the December 30, 1930, minutes did not change the effect of the December 1929 resolution except perhaps to emphasize it.

On December 30, 1930, the Board of Directors also considered the distribution of the sum of $140,938.98, said to have been the remainder of the 1928 Management Fund, which had never been distributed. In the same memorandum, read by the defendant, this matter was taken up, and a resolution appears authorizing this distribution "to such officers as were eligible for participation at the close of the year 1928" and were still, at that time, "in the employ of the company."

On January 6, 1931, this distribution was actually authorized and was subsequently made. Of this sum, the defendant received the sum of $50,000.

672 From the fact that the minutes do not show, and that the witnesses have testified that there was not any suggestion that this money be applied against the amount of the so-called advance of July 1, 1929, the Government has asked you to infer that the defendant and the Board of Directors did not regard that payment of July 1, 1929, as a debt owing to the Company in any sense of the word.

It also appears from the memorandum read by the defendant and the minutes of the meeting of December 30, 1930, in which it was incorporated, that distribution from the balance of the 1928 fund of the share of any officer not eligible, was also to be made, in proportions to be determined by a special committee consisting of Messrs. Swenson, Winthrop, and Winston. At the meeting of January 6, 1931, it appears that the Board of Directors had approved the recommendation of this special committee and had authorized the distribution of the share of Mr. G. K. Weeks, who was at that time no longer with the company, among the other officers. From this, the

Government has asked you to conclude that the defendant and the Board of Directors did not regard Mr. Weeks' share of the July 1, 1929, payment as a debt, because they did not apply his portion of the 1928 payment to such indebtedness but instead distributed it to the other officers without any mention of the possibility of applying that money against his alleged indebtedness.

On January 9, 1931, three days later, the Board of Directors again met and adopted a balance sheet which included, in any analysis of surplus and reserves, a reserve of $1,859,299. This sum, of
673 course, is just $1.00 less than the total amount of $1,860,000 which had been paid to the officers on July 1, 1929, out of the Management Fund.

On December 27, 1932, the Board of Directors actually applied the reserve previously set up against the July 1929 payment to officers, and wrote the accounts down to $1.00 on the books, stating, however, that this act did not in any respect release the participants from their obligations to the company.

On October 10, 1932, the defendant made a report to the Board of Directors showing the state of accounts between the National City Company and Mr. Lee Olwell, an officer who was retiring. The amount of this account was stated as $393,000. It had been reduced on the company's books to $212,000. The original $393,000 indebtedness of the defendant, described by the defendant in his report as representing "loans and advances," did not include the July 1929 payment which had been made to Mr. Olwell. From this the Government asks you to draw the inference that defendant did not consider Olwell's July 1929 payment as either a loan or an advance and therefore not as a debt of any kind.

If you find, from the evidence, that this money, at the end of the year 1929 was a mere loan which the defendant was definitely obligated to repay, then you must find that it was not income. On the other hand, if you find that this money was to be repaid by the defendant only out of future credits to him in the Management Fund, if any, then, I charge you that it was income and should have been reported as such.

674 If you so find, there will still be a question for you to decide—which is—if you find that the defendant, at the end of the year 1929, regarded himself as being under an unconditional obligation to repay the money, and as owing a debt; or if you find, irrespective of whether or not he personally regarded it as a debt, that in good faith, and with no intent to violate the law, he sought advice of counsel as to whether or not it was income, laid all the facts fully and frankly before counsel, and in reliance upon counsel's advice that it was not income omitted the item from his 1929 return, believing it not to be income and being without intent to defeat or evade his tax, then, likewise, you should find in his favor with respect to this item. If, on the other hand, you find that the defendant, knowing the money to be taxable income, and you find it to be wilfully omitted from his tax return with intent to evade payment of

income taxes, you should find against him on this item, even though he did not consult counsel before the date when his return was filed. If you find that the defendant planned the method of handling this item, either alone or with others, so that it would not be conditionally repayable but would appear to be so, and for the deliberate purpose, either in whole or in part, of avoiding actual repayment of the money and at the same time of evading income taxes which he knew to be due, then, of course, you should find him guilty in connection with this item.

The defendant has testified that in January 1930 he received a notice from the National City Company regarding his income from it for 1929 and that this notice did not include the July first pay-
675 ment. If you find that the defendant relied upon this notice as a statement of his taxable income, you may consider that fact, together with the other facts.

There has been introduced in evidence a letter sent by the Treasury Department to the defendant, tentatively approving his return for 1929. The Government has contended that this letter was written to the defendant by the Revenue Agent in Charge upon wholly incomplete facts and it has been shown that the report of Agent Hussey does not contain any mention of the fact that the sale of the 18,300 shares of December 20, 1929, was a sale to the defendant's wife, that no cash was paid on the sale and no stock delivered. Nor does the report make any mention of the item of $666,666.67. The letter of the Treasury Department to the defendant, in so far as it purports to be an opinion or decision on the correctness of the defendant's tax return, has no bearing upon the issue before you gentlemen. You gentlemen are the sole judges of the facts under the law as the Court states it to you. No other person, official, or tribunal can substitute himself of itself as the judge of the law in lieu of this Court or as the judge of the facts, which it is your province, and your province alone, to decide.

You may consider the letter to the defendant by the Treasury Department in a very limited connection only and that is as bearing upon the failure of the defendant to file an amended return for the year 1929 at some time subsequent to the filing of his original return. There is no evidence to show that the defendant ever intended to file an amended return, that he ever took any steps toward the
676 filing of such return, or that he neglected to take such steps upon the basis of any communication he received from the Treasury Department. If you find that the defendant was not deterred from a determination to file an amended return by the letter of the Treasury Department you should put that letter completely out of your mind in deciding this case and you should not consider it as bearing upon the good faith of the defendant. If you find, on the other hand, that the defendant might reasonably have been dissuaded from filing an amended return because of this letter, you may then consider whether he made full disclosure to the agent of the Treasury Department of all the facts which he reasonably deemed

material to the examination. If he did not make such full disclosure you may then consider whether or not he could honestly have put any reliance upon the Treasury Department letter as a reason for not filing an amended return.

Since the Management Fund distribution of July 1, 1929, consisted of a lump sum of $1,860,000, of which the defendant received $666,666.67, other officers participating in the balance, certain testimony was given about the treatment of the payments to other officers. This testimony bears on your decision in the case only in so far as it may help you in determining the intention of the defendant with regard to the omission of the item of $666,000 from his income tax return for the year 1929.

Whether the other officers did or did not pay income taxes is no concern of ours in this trial and should not be considered by you.

677 There are, however, certain acts of the defendant and the Board of Directors, with reference to other officers, which you may properly consider. You must sharply distinguish, on the one hand between what these officers may or may not have done with respect to their payments, which has absolutely no bearing on this case, and, on the other hand, what may have been done by the defendant and the Board of Directors in connection with the officers' payments. The latter is material and relevant for such help as it gives you in determining the true intention and understanding of this defendant, as to the character of the payment to him of the sum of $666,666.67.

The defendant offered testimony concerning an examination of the income tax return of Mr. Stanley A. Russell, who was a participant in the 1929 Management Fund distribution, by Revenue Agent Berman, and concerning Berman's conference with Mr. Garrard Winston on that subject. This testimony tended to show that the Treasury Department had approved the omission of that item from Mr. Russell's return. The Government, on the other hand, elicited testimony tending to show that the true facts regarding the distribution were concealed from the Revenue Agent and that the action of the Treasury Department was based upon mis-statements and incomplete facts.

It is not an issue in this case whether the action of the Treasury Department based on the report of the Agent Berman was correct or incorrect, or whether the Treasury Department was fully advised of the facts or whether the facts were concealed from the agent.

678 Whether the Treasury Department was deceived or not in its decision in connection with Mr. Russell's return is of absolutely no consequence here. The law in this case is determined in accordance with the Court's charge to you, and the determination of the facts is solely for you.

The only relevancy of this testimony and the only purpose for which you may consider it, is in connection with evidence that the defendant was told some time after October 1931 that the Treasury Department had approved of the omission from Mr. Russell's 1929

income tax return of the item of the Management Fund distribution of July 1929. This testimony may be relevant only because every taxpayer has a right to file an amended return within three years after the filing of his original income tax return. If you should find that the omission of the item of $666,666.67 from the defendant's income tax return for 1929 was innocent or inadvertent, and that he refrained from filing an amended return later because he heard that the Treasury Department had approved of the omission of a similar item from Mr. Russell's return, then you may take that fact into consideration in determining the guilt or innocence of the defendant in connection with that item. However, there is no testimony that the defendant ever considered filing an amended return, but you may nevertheless take these factors into consideration.

It is undisputed that an agent of the Bureau of Internal Revenue named Hussey examined the defendant's 1929 return in February of 1931. The witness Black testified that Hussey asked him about the deduction claimed upon the alleged sale of 18,300 shares to Mrs. Mitchell, and that he thereupon showed the agent carbons of
679 the letter of December 20, 1929, and referred him to the defendant. The defendant testified that he showed Hussey one original and one carbon of the letters between him and Mrs. Mitchell dated December 20, 1929.

If you find that a full disclosure of all of the relevant facts was made by the defendant to the agent of the Government who examined the return you may consider that as one of the facts bearing upon whether or not he intended to evade payment of tax for 1929. But it is only one of the facts and circumstances that you are to consider in determining the ultimate question of the defendant's guilt or innocence, and is not necessarily conclusive upon that question.

If, on the other hand, you find that there was not a complete, full and frank disclosure by the defendant to the representative of the Government, you may consider that as some evidence of his intent to evade payment of tax as charged by the Government. By a full disclosure is meant a disclosure of all the facts which the defendant may reasonably be expected to have felt would be material to the question whether or not the alleged sale to Mrs. Mitchell was a bona fide and unconditional sale. If upon all the other evidence you find beyond a reasonable doubt that the defendant did not intend to make a complete and unconditional sale to his wife and that he acted as he did with intent to defeat and evade the payment of tax, then, of course, such disclosures as he made to the Revenue Agent constitute no defense in this case.

There is no evidence that Hussey was told anything concerning the item of $666,666.67, nor was any reference made to it in the defendant's tax return. On the other hand, Mr. Black testi-
680 fied that his work sheet, on which this item appeared, was among the work sheets which were available to Hussey. You may make whatever inferences you deem proper from the failure

specifically to inform Hussey concerning the facts connected with this particular item, if you find there was such failure, as bearing upon the intent of the defendant.

If you believe from all of the evidence, beyond a reasonable doubt, that the transaction of December 20, 1929, between the defendant and Mrs. Mitchell was not an unconditional bona fide sale, and was not intended to be one, but was instead a mere pretense or formality gone through with the intent to evade payment of the defendant's income taxes, then, you should convict the defendant on the first count of the indictment, irrespective of whether or not you also find him guilty in connection with the $666,666.67 item also involved in that year. If you believe from all the evidence, beyond a reasonable doubt, that the defendant, when he omitted to include in his 1929 income tax return the item of $666,666.67 received by him in July 1929 from the management fund of the National City Company, knew that money was in reality income which it was his duty to report and pay taxes on, and you find that it was and that he omitted it from his return with intent to evade taxes, then you should find him guilty on the first count of the indictment, irrespective of whether or not you also find him guilty in connection with the sale to Mrs. Mitchell. Of course, if you find him guilty on the sale to Mrs. Mitchell and also on the omission of the $666,000 item that would be an additional reason for rendering a verdict of guilty on the first count of the indictment, which deals with the defendant's income tax for the year 1929.

681

Gentlemen, we will now take up the last charge, which is the one involving the alleged sale by defendant of 8,500 shares of Anaconda Copper Mining Company stock to W. D. Thornton on December 26, 1930, and the alleged repurchase by defendant from Thornton on May 4, 1931, at practically the same price.

The details of this transaction have been related by counsel, and I shall not take the time to repeat them.

There is evidence for your consideration tending to establish various facts and circumstances bearing on the question whether the sale of 8,500 shares of stock of the Anaconda Copper Mining Company to W. D. Thornton on December 26, 1930, was a bona fide sale, or only a sham sale resorted to as a means of attempting to defeat and evade payment of income tax for 1930.

The defendant has testified that his first intention was to sell his 8,500 shares of Anaconda Copper stock in the open market, but that instead, at Mr. Ryan's request, he sold it at a private sale after Mr. Ryan had procured a customer. The Government contends that such testimony to the effect that the defendant was doing Mr. Ryan a favor, instead of Ryan doing the defendant a favor, is improbable, implausible and unreliable. In support, the Government points to the defendant's letter to Ryan of December 26, 1930, in which he thanks Ryan for his "own auspices in this matter." The Government asks you to infer from this that the defendant was thanking Ryan for assisting him in finding a pretended pur-

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chaser and for financing the purchaser with the additional collateral of 2,500 shares, for the express purpose of enabling the defendant to record a fictitious sale for tax purposes, and the Government further claims that this is borne out by Ryan's activities in arranging a re-purchase for Mitchell by Thornton through Hornblower & Weeks supplying the same stock as collateral for the purchase.

The defendant has testified that the sale to Thornton was made for the purpose of taking a tax loss and it appears that the loss claimed by the defendant on this transaction was sufficient to wipe out his taxable income for the year 1931. It appears that at the time of the alleged sale on December 26, 1930, no money passed between Thornton and Mitchell, the defendant himself arranging through J. P. Morgan & Company to make a loan to Thornton to the extent of the purchase price of the stock, the proceeds of that loan being credited, by bookkeeping entries, against the loan which the defendant was already carrying with J. P. Morgan & Company with the result that the amount of the defendant's loan was decreased by the amount of the purchase price loaned by Morgan to Thornton.

It also appears that the letter signed by Thornton in connection with the carrying through of his purchase was drafted by the defendant himself and sent by him to John D. Ryan for Thornton's signature.

The evidence also discloses that there found its way into the defendant's papers a memorandum prepared by an accountant
683 who did work for Thornton, which recapitulated the figures in the transaction, and showed the net result to Thornton of his purchase of the later sale of these 8,500 shares of stock. This memorandum showed a net loss to Thornton of $201.71 on a transaction involving $229,000.

The Government asks you to conclude from the circumstances outlined above and other facts, that the original sale to Thornton on December 26, 1930, was not an absolute one but that the defendant fully intended at that time to reacquire the stock, and had an express or implied understanding or agreement with either Ryan or Thornton for such repurchase. The defendant, on the other hand, has testified that the co-existence of these circumstances is the result of mere coincidence; that the defendant did not know, when he repurchased 8,500 shares of Anaconda in May 1931, that he was repurchasing the same 8,500 shares he had sold to Mr. Thornton; that he did not know the 2,500 shares which Ryan lent him to make the purchase possible were the same 2,500 shares that had been lent to Thornton some months before to make the purchase possible, and that the memorandum which I have mentioned was not procured by him with any definite purpose in mind, but was merely handed to him by Ryan after the carrying into effect of the repurchase, as a matter of curiosity and interest. The defendant also asks you to bear in mind that there is no evidence that the net loss of $201.71 to Thornton on the entire transaction was ever repaid to him; that Thornton's books

showed the purchase and sale; that Thornton received the dividends and that these were included in the computation showing
684 his loss to be $201.71; that the repurchase was made through the Stock Exchange, and the defendant asks you to conclude from these circumstances as well as the others in the case, that this was a genuine sale.

You had the opportunity of seeing Mr. Thornton and hearing him testify, and I have no doubt formed your own opinion as to just what his part was in this transaction.

Unless you find beyond a reasonable doubt that the defendant's transaction of December 26, 1930, was a bona fide sale, you should find the defendant not guilty of Count Two; but if you are convinced beyond a reasonable doubt that it was not a bona fide sale, but was a mere pretense, carried through by the defendant with fraudulent intent of evading his income tax, then you should find the defendant guilty on Count Two of the indictment which deals with the year 1930.

The defendant had the right to sell his stock for tax purposes and repurchase it after thirty days have elapsed without in any way depriving himself of his right to take a tax loss on the sale, and if you are not satisfied beyond a reasonable doubt that the repurchase in this case was pursuant to an understanding or agreement, then you must acquit the defendant on the second count of the indictment. But on the other hand if you are satisfied beyond a reasonable doubt that the repurchase was made pursuant to an understanding or agreement for such repurchase, either with John D. Ryan or W. D. Thornton, which existed at the time of the original sale, and that the sale on December 26, 1930, was not made unconditionally, finally,
685 and in good faith, but was in fact made fraudulently for the purpose of defeating and evading income taxes, then you should convict the defendant on Count Two of the indictment.

It is for you to determine whether the facts and circumstances, which the evidence as a whole establishes, are or are not consistent with the explanation offered by the defense, and, if they are not, whether they satisfy you beyond a reasonable doubt that the sale to Thornton was a mere pretense carried through as part of an attempt to defeat and evade payment of income tax.

There is no question before you as to the legal sufficiency of the papers drawn in connection with the alleged sale to Mrs. Mitchell or as to the sale to Mr. Thornton. If intended by the defendant as genuine honest sales with no understanding as to repurchase both transactions were legally valid and sufficient, nor would any of the incidents which happened after those sales, such as the gifts in the case of the transaction with Mrs. Mitchell, or the repurchase in either case invalidate a genuine original sale. The evidence submitted by the Government and by the defendant as to concurrent and subsequent acts is for the purpose of aiding you to determine the intent of the defendant in regard to those sales. The question for you to determine concerning these sales is whether they were real sales or not.

You may find the existence of an intent to commit the crime of attempting to evade or defeat payment or collection of a tax, even though there is coupled with that intent a desire to accomplish another object at the same time.

686 You are the sole judges of the credibility of the witnesses in this case including the defendant. In determining their credibility you will carefully scrutinize the testimony given in the light of all the circumstances in which it was given. You naturally will take into consideration the demeanor and manner of each person while on the witness-stand. What interest, if any, he has in the outcome of the case; what relationship, whether business or social, if any, exists between him and the defendant or the Government. The probability or improbability of his testimony. The opportunity he has had to observe and the opportunity to be informed as to matters respecting which he has given testimony. The inclination which he has shown or which he has not shown to answer questions of counsel fully, frankly, and willingly. The extent to which he is contradicted or corroborated by other credible witnesses, if at all. If you believe that any witness has wilfully sworn falsely to any material fact in the case, you are at liberty to disbelieve the testimony of that witness in whole or in part. You may accept a part of the witness' testimony and reject other portions of it.

The testimony as to the defendant's reputation should be considered by you together with all the other evidence in the case, since evidence of good character may itself sometimes create a reasonable doubt. If, upon all of the evidence, including that of good repute, you are not satisfied of the guilt of the defendant beyond a reasonable doubt, you should acquit him.

You may properly consider also in that connection that men of the highest reputation are sometimes guilty of crime. One who

687 is proved beyond a reasonable doubt to be guilty of a crime should not be acquitted because of sympathetic or any other considerations arising out of such testimony.

Revenue Agent Kunkel testified as to the computations of taxes which would be due in the event that any or all of these transactions were attempts to defeat or evade the income tax laws. If the defendant had reported as income the $666,666.67 and had also refrained from claiming a deduction on the alleged sale to Mrs. Mitchell, his net income would have been $3,466,324.02. Upon this income a tax of $728,709.84 would have been due. If the defendant properly omitted the $666,666.67 but improperly claimed a deduction concerning the sale to Mrs. Mitchell, his net income would have been $2,823,405.85, upon which a tax of $568,798.84 would have been due. If the deduction claimed because of the alleged sale to Mrs. Mitchell had been properly taken and the item of $666,666.67 improperly omitted, the net income of the defendant would have been $608,703.52 upon which a tax of $75,867.94 would have been due.

With regard to 1930, if the deduction claimed because of the alleged sale to Mr. Thornton had not been taken, the net income of

the defendant for the year 1930 would have been $624,637.89, upon which a tax of $121,719.84 would have been due.

If, therefore, by either of the transactions involved in Count 1, the defendant wilfully and fraudulently attempted to defeat and evade an income tax in any sum, then, you must find him guilty on Count 1. If, by the making of a false sale to Mr. Thornton,
688 he wilfully attempted to defeat an income tax in any sum, then, you must find him guilty on Count 2.

Any rulings that have been made by me in the course of the trial as to the admissibility of evidence or as to any other matter are rulings purely on matters of law. They reflect no views of mine on the facts of this case. They are purely on matters of law and not on facts.

You gentlemen should reach your verdict without fear of favor for, sympathy with, or malice against, either the Government or the defendant, and without regard to the present or former position or standing of the defendant. The issue you are trying on the first Count is whether the defendant attempted to defeat and evade an income tax for the year 1929, and on the second Count, whether he attempted to defeat and evade an income tax for the year 1930. Anything that may have happened after the periods in question is entirely irrelevant, and unless it in some way bears upon the state of mind of the defendant as it existed at the time he did certain acts alleged to be crime. If you are not satisfied beyond a reasonable doubt that the defendant committed the crimes charged, you must not convict him because of malice, prejudice or for any other reason. If you find beyond a reasonable doubt that a crime or crimes were committed as charged, it is your duty as jurors to find the defendant guilty, regardless of any sympathy you may personally feel for the defendant.

As to the form of the verdict you are to return in this case, there are two counts in the indictment. The first of these counts relates to the year 1929 and charges the use of two entirely separate
689 means or methods of committing the crime charged. First, there is the deduction which was based on the alleged sale to Mrs. Mitchell; and second, there is the omission of the item of $666,666.67. The second Count relates to the year 1930 and is based upon the alleged sale to William D. Thornton.

You may find the defendant either guilty or not guilty on Count One without any reference to your verdict as to Count Two. So, also, you may find the defendant guilty or not guilty on Count Two, without reference to your verdict on Count One. In other words, you may acquit the defendant on both Counts, or you may convict the defendant on both Counts, or you may acquit the defendant on one Count and convict him on the other. Count One, relating to the year 1929, as I have said, involved two separate transactions—the transaction with Mrs. Mitchell and the item of $666,666.67. As to this first Count, I charge you that you may find the defendant not guilty with regard to both transactions, and therefore not guilty as

to Count One. On the other hand, you may find that the defendant is guilty with reference to one transaction but not guilty with reference to the other. In this event you should return a verdict of guilty as to Count One.

That is to say, if you should find that the defendant is not guilty in connection with the transaction with Mrs. Mitchell but guilty in connection with the item of $666,666.67, then your verdict should be guilty on Count One. If on the other hand you find the defendant guilty in connection with the transaction with Mrs. Mitchell but not guilty in connection with the item of $666,666.67 then
690 your verdict on Count One should likewise be guilty. In other words, if you find that the defendant is guilty either in connection with the transaction with Mrs. Mitchell or in connection with the item of $666,000, you should convict him on the first Count. If you find the defendant guilty in connection with both transactions, then, of course, your verdict should be guilty on Count One.

Gentlemen, the only mode provided by our laws for deciding questions of fact in such cases as this is the verdict of a jury.

Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions and not a mere acquiescence in the opinions of his fellows, yet in order to bring your twelve minds to a unanimous result, you must examine the questions submitted to you with a proper regard for and deference to each other's opinions.

You should consider that you are selected in the same manner and from the same source as another jury must be in the event of your inability to agree upon a verdict. There is no reason to suppose that this case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that other or clearer evidence will ever be produced on one side or the other. Thus, it is your duty to decide the case by arriving at a verdict, if you can conscientiously do so.

And now, gentlemen, I shall leave the case with you with full confidence that you will strive to render a verdict that is just to the defendant and to the Government.

I have received about 110 requests to charge from counsel
691 for defendant. I have covered many of them in my charge, but so that the defendant may be fully protected I have handed to the official reporter all of the requests submitted by the defendant after indicating the Court's disposition of each request and the defendant has an exception as to each and every one of its requests.

Last evening I received some additional requests from the defendant's counsel. These I have looked over. Some I have covered; others I think I denied, and the defendant may have an exception as to each one of them, which I shall hand to the official reporter.

Now, these two alternate jurors, Mr. Bartels and Mr. Austin, you are excused from further consideration of this case and discharged with the thanks of the Court and the twelve jurors in the box will now kindly follow the marshal.

Let me say this to you gentlemen, as to the exhibits: Such exhibits as you would like you may have upon request.

692 *Petitioner's Exhibit No. 61.*

United States District Court, Southern District of New York

C 94-439. Violation of Sec. 146 (b), Revenue Act of 1928. Attempt to defeat and evade income tax for the years 1929 and 1930

THE UNITED STATES *vs.* CHARLES E. MITCHELL

DOCKET ENTRIES

1933

Apr. 25 Filed Indictment.
" 25 Pleads Not Guilty.
May 11 Filed order for two alternate jurors. Goddard, J.
June 1 Filed petition for an order to produce records, etc.
" 1 Filed order to produce certain records. Goddard, J.
May 11 Trial begun. Goddard, J. Jurors sworn.
" 15 Jurors #1-4-6 and 9 excused by the Court with consent of Mr. Medalie, U. S. Atty. and Mr. Steuer, Atty. for defendant.
" 15 Jurors and alternate jurors sworn.
" 16 Trial continued. Mr. Medalie opens to jury. Mr. Steuer opens to jury.
" 17 Trial continued.
" 18 " "
" 19 " "
" 22 " "
" 23 " "
" 24 " "
" 25 " "
May 31 Trial continued.
693 June 1 " "
" 2 " " Government rests.
June 5 Trial continued. Mr. Steuer moves to dismiss all evidence and testimony adduced by the govt. with relation to the transaction between the deft. and Mrs. Mitchell on Dec. 20, 1929. Denied, Exception.
" 5 Mr. Steuer moves to dismiss the first count of the indictment. Denied, Exception.
" 5 Mr. Steuer moves to strike the testimony with respect to the 18,300 shares of National City Bank stock on Dec. 20, 1929. Denied, Exception.
" 5 Mr. Steuer moves to strike out the evidence and testimony with relation to "management fund" item. Denied, Exception.

June 5 Mr. Seuer moves to strike out all evidence and testimony with relation to the so-called "Thornton transaction." Denied, Exception.

" 5 Mr. Steuer moves to dismiss the second count of the indictment. Denied, Exception.

" 5 Mr. Steuer moves to dismiss the indictment as a whole. Denied, Exception.

" 6 Trial continued.

" 7 " "

" 8 " "

" 9 " "

June 12 Trial continued.

694 " 13 " "

" 14 " "

June 15 Trial continued. Defendant rests. (Both sides rest.)

" 19 " " Motion to strike all evidence with respect to the item of 18,300 shares of National City Bank Stock. Denied, Exception.

" 19 Motion to strike all evidence with respest to the item of $666,666.67—"management fund." Denied, Exception.

" 19 Motion to dismiss the first count of the indictment in so far as it pertains to the sale of 18,300 shares of National City Bank stock. Denied, Exception.

" 19 Motion to dismiss the first count of the indictment in so far as it pertains to an item of $666,666.67.

" 19 Motion to dismiss the first count. Denied, Exception.

" 19 Motion that the Court direct the jury to acquit the deft. on first count: 1st as to the item of sale of 18,300 shares of National City Bank stock, 2nd as to the item of $666,666.67. Denied, Exception.

" 19 Motion that the Court direct the jury to acquit the deft. on the first count. Denied, Exception.

" 19 Motion to strike all evidence adduced in support of the second count. Denied, Exception.

" 19 Motion to dismiss the second count. Denied, Exception.

695 June 19 Motion that the Court direct a verdict of acquittal on the second count. Denied, Exception.

June 19 Motion that the Court direct a verdict of acquittal on both counts of the indictment. Denied, Exception.

" 19 Mr. Steuer sums up.

" 20 Trial continued: Mr. Medalie sums up.

" 21 " " Charge by the Court. Officer sworn. Jury retires.

" 21 Filed note sent by jury, requesting to hear portion of the Court's charge relating to management fund.

June 22 (10:45) Filed note sent by jury, requesting to hear portion of the Court's charge relating to management fund and also general instructions at the end of charge.
" 22 (12:20) Filed note sent by jury advising that they were unable to arrive at a verdict, etc.
" 22 Verdict: Not Guilty on both counts.
" 22 Filed list of government's exhibits.
" 22 " list of defendant's exhibits.
" 22 " note sent by jury for further advice, etc.
" 22 " copy note sent by Goddard, J. to the jury.

12/28/33.

696 UNITED STATES OF AMERICA
Southern District of New York, ss:

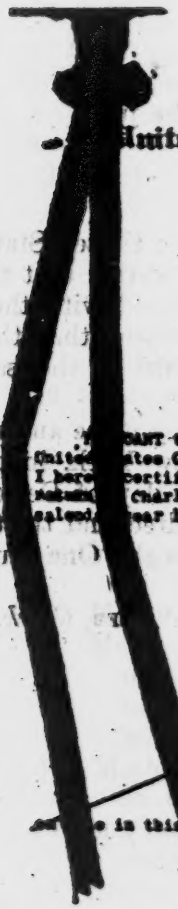
I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this Twenty-eighth day of December in the year of our Lord one thousand nine hundred and thirty-three and of the Independence of the United States the One Hundred and fifty-eighth.

[SEAL] CHARLES WEISER, *Clerk.*

697

RESPONDENT'S EXHIBIT A



United States of America

TREASURY DEPARTMENT
WASHINGTON

U. S. Dist. Court,
S. D. of N. Y.
Ex. 1

March 3, 1933

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of the individual income tax return of Charles E. Mitchell, 834 Fifth Avenue, New York, New York, for the calendar year 1929, and attached schedule.

U. S. BOARD OF TAX APPEALS
DOCKET 72720
APR 3 1934
PETITIONER'S EXHIBIT A
RESPONDENT'S

...e in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

J. R. Bilgreen
Chief Clerk, Treasury Department.

...TREASURY DEPARTMENT, Form ... and ...

696

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $3,000
AND INCOMES FROM DIVIDENDS, PROFESSIONS, RENTS, OR SALE OF PROPERTY

For Calendar Year 1929

(To Be Filed With the Collector of Internal Revenue for Your District on or Before March 15, 1930)

PRINT NAME AND ADDRESS PLAINLY BELOW

CHARLES E MITCHELL
934 FIFTH AVENUE
NEW YORK CITY N.Y.

REVIEWED SECTION A BY J.M.M. DATE MAR 27 1930

For Use Within the Three Cities

No. 2002

No. 731968

RECEIVED
No. 15
MAR 15 1930
COLLECTOR OF INTERNAL REVENUE

3-New York

3

1. Are you a citizen of resident of the United States? Yes
2. Are you married and living with husband or wife on the last day of your taxable year? Yes
3. If married, state name of husband or wife and the year of your marriage. If not married, so state. Married 1st Webster Thorpe 1926
4. If married and not living with husband or wife on the last day of your taxable year, state reason why, and name and address of husband or wife. Divorced
5. If you claim to be the head of a family, state relationship of persons claimed as dependents. Two
6. If you claim credit for payments of income taxes of husband or wife under 18 years of age or incapable of self-support, state reason why. Two
7. Were you a member of a partnership during the taxable year? If so, state name and address of each partner. No
8. Did your husband or wife have a separate income? If so, state amount. No
9. Did you receive dividends on stock owned jointly with husband or wife? If so, state amount. No
10. Did you receive community property income? If so, state amount. No

INCOME

1	National City Bank of New York 55 Wall St New York City		
	National City Company do do		
2. Income from Business or Profession. (Give business.)			
3. Interest on Bonds, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)			
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source			
5. Income from Partnerships. (Give name and address)			
6. Income from Fiduciaries. (Give name and address)			
7. Rents and Royalties. (Give kind and location)			
8. Profit from Sale of Real Estate, Stocks, Bonds, etc. (Give details on Page 2)			
Gain or Loss from Liquidation of Domestic Corporations			
Gain or Loss from Sale or Exchange of Capital Assets (Schedule D)			
Interest on Liberty Bonds, etc. (Give details)			
Dividends or Income (including dividends on stock of foreign corporations). (Give name of issuer) Miscellaneous Income			
9. Gross Income. (Total of Items 1 to 8)			

DEDUCTIONS

10. Interest Paid			
11. Taxes Paid. (Do not include taxes assessed against local benefits.)			
12. Losses by Fire, Storm, etc. (Do not include losses claimed on Page 2)			
13. Bad Debts. (Do not include debts claimed on Page 2)			
14. Contributions. (Do not include contributions claimed on Page 2)			
15. Other Deductions Authorized by Law. (Specify them below)			
16. Total Deductions. (Total of Items 10 to 15)			
17. Net Income. (Item 9 minus Item 16)			

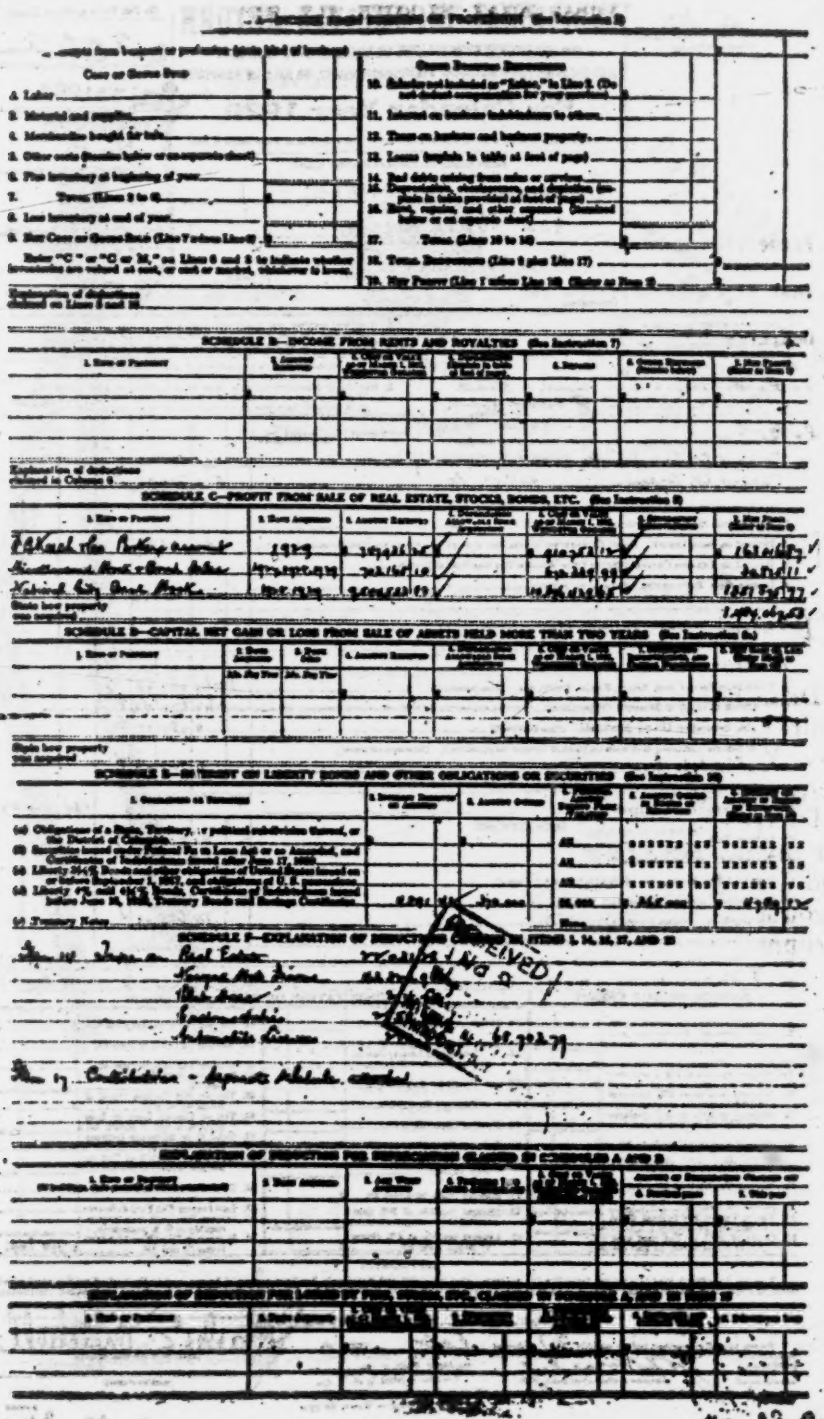
EARNED INCOME CREDIT

18. Earned Income (not over $30,000)			
19. Less Personal Exemption and Credit for Dependents			
20. Balance. (Item 18 minus 19)			
21. Amount taxable at 1½% (not over $6,000)			
22. Amount taxable at 2½% (not over $6,000)			
23. Amount taxable at 3½% (balance not over $6,000 of Item 18)			
24. Earned Income Tax (1½% of Item 21)			
25. Earned Tax (2½% of Item 22)			
26. Earned Tax (3½% of Item 23)			
27. Total Earned Income Tax			
28. Net Income (Item 17)			
29. Tax on Earned Net Income (Item 27)			
30. Credit of 25% of Tax (not over 25% of Item 29)			

COMPUTATION OF TAX

31. Net Income (Item 17)			
32. Less Dividends (Item 9, Col. 1)			
33. Balance			
34. Credit for Dependents			
35. Personal Exemption			
36. Total of Items 34 to 35			
37. Balance (Item 33 minus 36)			
38. Amount taxable at 1½% (not over $4,000)			
39. Amount taxable at 2½% (not over $4,000)			
40. Balance (Item 37 minus 38 and 39)			
41. Amount taxable at 3½% (Item 40)			
42. Normal Tax (1½% of Item 38)			
43. Normal Tax (2½% of Item 39)			
44. Normal Tax (3½% of Item 41)			
45. Total Normal Tax			
46. Surtax on Net Income (Item 31)			
47. Total Tax (Items 45 plus 46)			
48. Tax on Dividends (Item 32)			
49. Total Tax (Items 47 plus 48)			
50. Credit for Income Taxes of Husband or Wife under 18 years of age or incapable of self-support (Item 6)			
51. Balance			
52. Credit for Taxes Withheld at Source (Item 8)			
53. Balance			
54. Credit for Taxes Paid at Source (Item 4)			
55. Balance			
56. Credit for Taxes Paid to Foreign Countries (Item 5)			
57. Balance			
58. Credit for Taxes Paid to Possessions of U. S. (Item 6)			
59. Balance			
60. Credit for Taxes Paid to States (Item 7)			
61. Balance			
62. Credit for Taxes Paid to Municipalities (Item 7)			
63. Balance			
64. Credit for Taxes Paid to Municipalities (Item 7)			
65. Balance			
66. Credit for Taxes Paid to Municipalities (Item 7)			

699



700

FEDERAL INCOME TAX RETURN FOR 1929

CHARLES E. MITCHELL

864 FIFTH AVENUE, NEW YORK CITY

INTEREST PAID

Farmers' Loan and Trust Co., New York City	Loan	$ 1,649.99 ✓
East River Savings Institution, New York City	Mortgage	10,000.00 ✓
Guaranty Trust Co. of New York, New York City	Loan	15,900.00 ✓
J. P. Morgan & Co., New York City	Loan	66,506.04 ✓
F. B. Keech & Co., New York City	Brokerage Acct.	5,855.09 ✓
		$99,911.12

701 *Respondent's Exhibit C*

OCTOBER 30, 1929.

J. P. MORGAN AND COMPANY,
23 Wall Street, New York City, N. Y.

DEAR SIRS: Pursuant to arrangement made with Mr. Whitney, I desire to arrange a loan on the stock of The National City Bank of New York as collateral and in an amount to not more than $200 per share and for a total not in excess of $12,000,000.

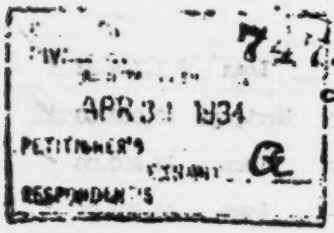
I have instructed The National City Company to deliver to you for my account shares purchased by them for me from time to time and I will ask you to accept and pay their debit bills against this account and place the collateral delivered by them in the loan account.

Yours very truly,

C. E. MITCHELL.

702

RESPONDENT'S EXHIBIT G



Ex. 10. Tsd. Gpm

December 20, 1929.

Dear Elizabeth,

This is to confirm that I have today sold to you for your account and risk 18,300 shares of the capital stock of The National City Bank of New York, ex-January 1930 dividend, at $212. per share which represents the present market.

The stock is in the name of Taff & Co. and is represented by certificates as per the attached sheet. These shares are at present being carried in a loan with J. P. Morgan & Company for my account, and for your convenience I will arrange to so continue the carriage of the stock subject to your payment of the amount due, the debt in any event to be liquidated by you within nine months from date hereof.

Taff & Co. have been notified through The National City Company to remit to you the dividends received on the stock and I will, from time to time, render you a bill for the interest due on the loan. In acknowledging receipt hereof, please confirm your verbal instructions to me with respect to liquidation of the account and oblige.

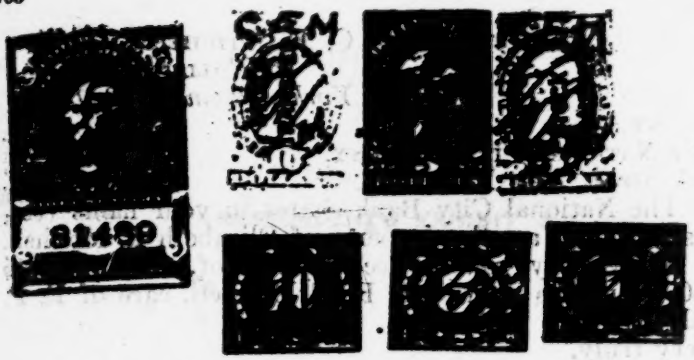
Yours very truly,

C. E. Mitchell

Mrs. Elizabeth R. Mitchell
354 Fifth Avenue
New York City

{ See stamp affixed on next page 13. }

703



Stamps affixed $111.46
Certified
Francis M. Riley
Internal Revenue Agent
2nd District of New York
New York, N. Y.
Aug. 11, 1933

704 *Respondent's Exhibit H*

934 Fifth Avenue,
New York, December 20, 1929.

Mr. Charles E. Mitchell,
55 Wall Street, New York.

Dear Charles: I acknowledge receipt of your letter of December 20 and confirm purchase from you of 18,300 shares of the capital stock of The National City Bank of New York at $212 per share under the terms as stated in your letter.

You are hereby authorized to sell from time to time or at any time that may seem in your judgment proper all or any part of the said 18,300 shares at markets then prevailing but at not less than $220 per share, the avails over and above the purchase price to be remitted to me as received and to be applied on account of borrowings.

Yours very truly,

Elizabeth R. Mitchell.

705 *Respondent's Exhibit I*

C. E. MITCHELL,
55 WALL STREET,
New York, December 20, 1929.

TAFF AND COMPANY,
Care of THE NATIONAL CITY COMPANY,
52 Wall Street, New York City.

GENTLEMEN: The National City Bank shares in your name (certificate numbers attached) are the property of Elizabeth R. Mitchell, and dividends received by you on account thereof, subsequent to January 2, 1930, should be paid to E. Rend Mitchell, care of E. F. Barrett, 55 Wall Street.

Yours very truly,

C. E. MITCHELL.

706 No. of certificates	Shares per certificate	Total number of shares	No. of certificates	Shares per certificate	Total number of shares
F 80718/25	8 @ 10	80	H 873/4	2 @ 5,000	10,000
F 81068/71	4 @ 5	20	H 875	1 @ 3,000	3,000
G 18464/8	5 @ 100	500	H 876	1 @ 238	238
G 18491	1 @ 100	100	F 79709	1 @ 2	2
G 18509	1 @ 100	100	F 79998	1 @ 3	3
G 18499/508	10 @ 100	1,000	F 79689/93	5 @ 3	15
G 18472	1 @ 100	100	F 79695/708	14 @ 3	42
G 18462	1 @ 100	100	G 18436/49	20 @ 100	2,000
G 18464/6	3 @ 100	300			
G 18423/9	7 @ 100	700	Total		18,300

707

RESPONDENT'S EXHIBIT J

M-R

No. SR 74126

CITY BANK FARMERS TRUST COMPANY
22 WILLIAM STREET

New York, February 18th 1930.

RECEIVED FROM E. F. Barrett, Esq.,

FOR THE ACCOUNT OF E. Rand Mitchell.

POSTED (d) 13896

BONDS SHARES PAR VALUE

Sealed envelope marked:

"a/c E. Rand Mitchell.
—Letters and papers re Securities with J.P.Morgan and Co.

Envelope only to be opened on instructions from Mrs. Mitchell, or E. F. Barrett, V.P. National City Bank, or [illegible] Bradford, V.P. City Bank Farmers, or [illegible] Dennis, V.P. City Bank Farmers."

SEC. RECORDS

HAV.

CITY BANK FARMERS TRUST COMPANY

708

RESPONDENT'S EXHIBIT K

Lee - Elizabeth Mitchell Carbon 6/4/35 —

C. E. MITCHELL
[illegible]
[illegible]

CORRES.
DEPT.

June 4, 1930

City Bank Farmers Trust Company
45 Exchange Place
New York City

Attention - Mr. Lindsey Bradford,
Vice President.

Gentlemen,

As a wedding anniversary present, I am giving to Mrs. Mitchell the following bonds, which I herewith hand to you for her account:

Cost

9 7/8	$10,000.	Russville Commercial Alcohol Co, due 1948. Nos. 1468 to 1472 inclusive.
" 90 1/2	$20,000.	Lautaro Nitrate Company 6s, due 1954. Nos. 23048 to 23056 inclusive.
" 93 3/4	$25,000.	Southern Pacific Company 4½s, due 1969. Nos. 63068 to 63082 inclusive.
Cost [illegible] 6.1/4	$5,000.	Sugar Estates of Oriente 7s, due 1942. Nos. 207, 1145, 2345, 3439, 3638.

If, for your purposes in accounting, you desire the cost of these bonds, the information will be given to you by my secretary.

Yours very truly,

C. E. Mitchell

709

RESPONDENT'S EXHIBIT L

C. E. MITCHELL
55 WALL STREET
NEW YORK

Copy filed in Doc Vault
Dr

August 21, 1918

City Bank Farmers Trust Company
43 Exchange Place
New York City

Attention - Mr. Lindsay Bradford
Vice President

C E Mitchell

Gentlemen,

I hand you herewith for account of my wife 500 shares of United States Realty and Improvement Company stock. I made a gift of these shares to Mrs. Mitchell on her birthday anniversary, August 10th, and I shall appreciate it if you will acknowledge receipt to her and to me.

Cost @ 41 1/4

CORRES
AUG 23 1918

Yours very truly,

C E Mitchell

Copy sent to Income Tax Dept
Dr

E 1

710

RESPONDENT'S EXHIBIT M

C. E. MITCHELL
[redacted]
New York

PRICE
TRUST DEPARTMENT

1/23/31

January 21, 1931

Dear Mr. Bradford,

I enclose herewith a check, drawn to the order of Mrs. Mitchell, in the amount of $25,000., which please credit to her account which you are managing. This is a gift promised to her by me at Christmas time.

Yours very truly,

C. E. Mitchell

Mr. Lindsay Bradford, Vice President
City Bank Farmers Trust Company
48 Exchange Place
New York City

Mr. Bradford acknowledges letter & advises he placed funds in Jones account

711

RESPONDENT'S EXHIBIT N

C. E. MITCHELL
55 WALL STREET
NEW YORK

April 10, 1931

City Bank Farmers Trust Company
22 William Street
New York City

Attention - Mr. Lindsay Bradford
Vice President

Gentlemen,

I enclose a check written to Mrs. Mitchell's order for $30,000., representing a gift from me to her, which she has asked that I hand to you for her account.

Yours very truly,

C. E. Mitchell

712

RESPONDENT'S EXHIBIT O

C. E. MITCHELL
[illegible]
[illegible]

Letter acknowledged.

June 30, 1931

City Bank Farmers Trust Company,
22 William Street,
New York City.

Gentlemen, Att: Mr. Lindsey Bradford
Vice President

I am making a gift today to Mrs. Mitchell of $25,000, check for which, drawn to her order, is enclosed. Please credit the amount to her account and oblige

Yours very truly,

C. E. Mitchell

713

RESPONDENT'S EXHIBIT P

Letter + ack acknowledges

C. E. MITCHELL
55 WALL STREET
NEW YORK

OK

TRUST DEPARTMENT

11/8/31

August 18, 1931

Dear Mr. Bradford,

This being Mrs. Mitchell's birthday, I am enclosing a check drawn to her account for $10,000, as a birthday gift, which kindly credit to her funds under your management.

Very truly yours,

Charles E. Mitchell

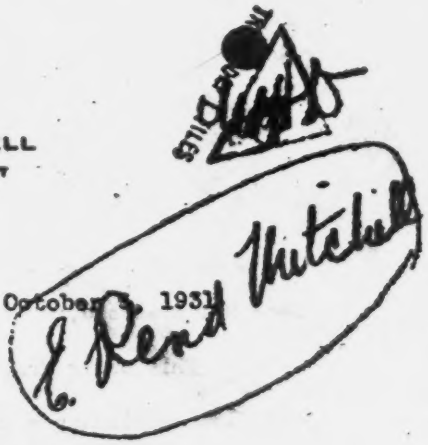
Enc.

Mr. Lindsay Bradford, Vice President
City Bank Farmers Trust Company
22 William Street
New York, New York

Dear Mr. Mitchell
C Read Mitchell

714

RESPONDENT'S EXHIBIT Q



C. E. MITCHELL
[illegible] WALL STREET
NEW YORK

October [illegible], 1931

Dear Mr. Bradford,

On this occasion of my birthday, I am making Mrs. Mitchell a gift of $25,000, check for which is enclosed. I will ask you to credit this to her investment account. Please be so good as to acknowledge receipt, and oblige

Yours very truly,

Mr. Lindsay Bradford, Vice President
City Bank Farmers Trust Company
22 William Street
New York, New York

Enclosure

715

RESPONDENT'S EXHIBIT R

C.E. MITCHELL
55 WALL STREET
NEW YORK

Letter + check acknowledged 12/29/31.

FILE
TRUST DEPARTMENT

December 29, 1931

City Bank Farmers Trust Company
22 William Street
New York, New York

Gentlemen, Att: Mr. Lindsay Bradford
Vice President

I hand you herewith, for credit to the account of Mrs. Mitchell, check for $30,000, which I am presenting to her as a Christmas gift.

Yours very truly,

C. E. Mitchell

for Jno. H. P.

E. Rend Mitchell

717 *Respondent's Exhibit S*

C. E. MITCHELL,
55 WALL STREET,
New York, August 11, 1932.

(E. Rend Mitchell)

DEAR MR. BRADFORD: I hand you herewith, for credit to the account of Mrs. Mitchell, check for $5,000, which I am presenting to her as a gift.

Yours very truly,

C. E. MITCHELL.

Mr. LINDSAY BRADFORD,
Vice President, City Bank Farmers Trust Company,
22 William Street, New York, New York.

Enclosure.

718 *Respondent's Exhibit V*

Memorandum

OCTOBER 2, 1931.

Mr. SWEENEY—

Re: Account E. Rend Mitchell

Receipts:			
1931			
Jan.	2	—National City Co	$18,300
"	22	—Recd from Mr. Mitchell	25,000
Apr.	1	—National City Co	18,300
"	10	—Recd from Mr. Mitchell	30,000
June	30	— " " " "	25,000
July	1st	—National City Company	18,300
Aug.	18	—Recd from Mr. Mitchell	10,000
Oct.	2nd	—National City Company	18,300
			163,200
Disbursements:			
Jan.	2nd	—Paid Mr. Mitchell	49,572.67
Apr.	"	" " "	48,495.00
July	1st	— " " "	49,033.84
Oct.	2nd	— " " "	49,576.67
			196,678.18
Difference due Mrs. Mitchell			33,478.18

H. M. PETERSON,
Asst. Trust Officer.

719 *Respondent's Exhibit W*

Memorandum

AUGUST 11, 1932.

Mr. SWEENEY—

In Re: Account E. Rend Mitchell

The figures given below include various receipts and disbursements for the above account—January 2, 1931, to date—including and supplemental to our memorandum of October 2, 1931.

Receipts:				
1931				
Jan.	2	—National City Co	$18,300	
"	22	—Recd. from Mr. Mitchell	25,000	
Apr.	1	—National City Co	18,300	
"	10	—Recd. from Mr. Mitchell	30,000	
June	30	— " " " "	25,000	
July	1	—National City Company	18,300	
Aug.	18	—Recd. from Mr. Mitchell	10,000	
Oct.	2	—National City Company	18,300	
Oct.	6	—Received from Mr. Mitchell	25,000	
Dec.	29	— " " " "	30,000	
1932				
Jan.	2	—Received from Natl. City Co	18,300	$236,500

Disbursements:			
1931			
Jan. 2—Paid Mr. Mitchell	$49,572.67		
Apr. 2— " " "	48,495.00		
July 1— " " "	49,083.84		
Oct. 2— " " "	49,576.67		
1932			
Jan. 2—Paid Mr. Mitchell	49,572.50	$246,250.68	
Difference			9,750.68
		H. M. Peterson, *Asst. Trust Officer.*	
Premiums Paid to date			$24,240.20
			33,990.88
Premiums due August 16			8,399.00
Total Disbursements			37,389.88

720 *Respondent's Exhibit X*

[Letterhead of]

Cravath, de Gersdorff, Swaine & Wood,
15 Broad Street,
New York, March 5, 1932.

Dear Sir:

At your request we have investigated certain transactions of The National City Company in stock of The National City Bank in October and November 1929 and the loan effected by you in your own name with J. P. Morgan & Company to assist The National City Company in those transactions.

The facts, as we understand them from our conversations with you, Mr. Hugh B. Baker, President of The National City Company, Mr. Rentschler, President of The National City Bank, and Mr. George Whitney, of J. P. Morgan & Company, and from certain computations from the relevant accounts furnished us by the National City Company, are as follows:

In September 1929 The National City Bank entered into an agreement of consolidation with Corn Exchange Bank Trust Company, providing that Corn Exchange stockholders should receive in exchange for their stock, shares of The National City Bank (with appurtenant rights in the stock of The National City Company and City Bank Farmers Trust Company on the basis of 4 shares of the latter for 5 shares of the former. By a simultaneous agree-
721 ment The National City Company agreed that if the consolidation were duly effected, it would purchase, at $360 per share in cash, any Corn Exchange stock tendered to it within twenty days after the effective date of the consolidation.

Obviously, this required the maintenance of a market for National City stock above $450 a share if the consolidation were to be consummated and if The National City Company were not to be required, pursuant to its agreement to take up a very large part of

the Corn Exchange stock for cash. Accordingly, after the making of the agreement, and until it became impracticable to go on with the transaction, it was the settled policy of The National City Company, in order to protect its commitment, to maintain such a market, and to that end purchases and sales were daily made in large volume through its trading account, known as the "Sole Account." Between the date of the Corn Exchange agreement and Saturday, October 26, the market quotation on National City stock did not fall below 455 bid, 465 asked, and during most of the period was materially above that figure.

When all markets showed evidence of weakness on Monday, October 28, The National City Company was under the necessity of making every possible effort to prevent any substantial decline in the price of National City stock. When heavy pressure came on the market late in the afternoon of that day, at a time when both Mr. Baker and you were away from your offices in connection with the general situation, the trader handling the market, understanding his instructions from Mr. Baker to require him to hold the market
722 steady, made heavy purchases resulting in an increase of inventory by 71,439 shares to a total of 83,677 shares. The cost of this increase in inventory was $32,108,053.31. When you returned to the office at about six o'clock and discovered this position you were greatly disturbed, because, in view of The National City Company's other commitments and the unavailability of the National City stock as collateral, the commitment involved in the purchase of this amount of stock was much larger than you would have been willing to have The National City Company undertake, even though failure so to have supported the market would have necessitated abandonment of the Corn Exchange deal.

The situation was immediately considered by you with Mr. Rentschler and Mr. Baker. National City stock could not, of course, be used as collateral to a loan to The National City Company by The National City Bank and you all agreed that it was most inadvisable to attempt to use such shares as collateral for a loan to The National City Company from other banks. You also all agreed that The National City Company was not in a position otherwise to finance any substantial further purchases. On the other hand, you all agreed that in the nervous state of the market an absence of buying orders after a period of strong support would result in a startling price drop, which would not only raise questions in the public mind as to the status of The National City Bank, with dangerous repercussions upon the already panicky general market, but also make impossible both the conclusion of the Corn Exchange merger and any liquidation of the large amount of National City stock which The
723 National City Company had accumulated. You also all agreed that this large accumulation by The National City Company constituted a distinct menace to its situation and that some way must be found to bring a semblance of orderliness into the market for National City stock the following day.

Early the following morning (Tuesday, October 29), before the opening of the market, you told Mr. Rentschler and, later, Mr. Baker, that your overnight thinking had confirmed you in the view that the situation was critical both with respect to The National City Company's own position and with respect to the Corn Exchange merger; that The National City Company could no longer, unassisted, give support to the market or have any reasonable hope of liquidating its already dangerously large position in National City stock; and that you had determined to use your own personal credit toward providing funds to assist The National City Company in an effort to give orderliness to the market price and thus, if possible, permit an orderly liquidation of the accumulated stock.

Accordingly, a Special Account was opened by The National City Company for the purchase and sale of National City stock, which was to be the medium through which you were temporarily to assist The National City Company as outlined, and to finance this Special Account you arranged with J. P. Morgan & Company for a loan up to $12,000,000. The determination both of the amount of stock to be bought and sold through the Special Account, and of the amount to be drawn against the Morgan credit, was left entirely to Mr. Baker's discretion.

724 The loan from J. P. Morgan & Company was effected in your own name and was to be secured by the pledge of your own personal securities and such National City stock as might be delivered for the purpose. At the time you effected the loan you neither disclosed to J. P. Morgan & Company the large amount of National City stock which had been accumulated by The National City Company nor the fact that in opening the loan you were doing so for the account of The National City Company. You did, however, explain to them that The National City Company was not in a position to use its own credit to purchase the additional National City stock which would be necessary to save the situation and that therefore you had determined to assist the "institution" with your personal credit. Mr. Whitney confirms that while he and his firm did not at the time know or ask just what "institution" or group was, in ultimate analysis, responsible for the loan, they have never regarded the transaction as one wholly personal to yourself.

Your arrangement with Mr. Baker was made under extreme stress and without calling in counsel to analyze its legal form or to reduce it to writing. It was, however, thoroughly understood by both Mr. Baker and Mr. Rentschler that you did not intend the account to be either one for the purchase of National City stock to be held by you indefinitely as an investment, or one through which you would, for your individual account, speculate in National City stock. Rather, as Mr. Baker states, he regarded the account as in reality an account of the National City Company, temporarily to be financed by you personally in that Company's interest. Hence,

725 while neither you nor Mr. Baker gave any consideration to the question whether the shares purchased in the Special Account

belonged to The National City Company, and were held by or for you as collateral, or belonged to you subject to an obligation on the part of The National City Company either to repurchase them or to find purchasers for them, Mr. Baker clearly understood that in handling the Special Account he should cause it to be liquidated as promptly as possible consistently with its purpose and thus relieve your personal credit of responsibility.

The Special Account remained open from October 29 until November 13. There are annexed as Exhibit 1, a statement of the purchases and sales of National City stock charged and credited to the Special Account, and as Exhibit 2, a statement of the purchases and sales charged and credited to The National City Company's "Sole Account" during the period from October 29 to November 11.

It will be noted that on October 30, after the special account had accumulated over 41,000 shares, it was credited with the sale of 28,300 shares. These shares did not in fact represent sales but represented stock delivered to J. P. Morgan & Company as part collateral to the loan above mentioned, against payment by J. P. Morgan & Company to The National City Company of $10,386,170.50. The determination of the number of shares so to be delivered to J. P. Morgan & Company was made by Mr. Baker, and the reason that 28,300 shares were taken was that the retail sales of The National City Company credited to the Sole Account had been
726 such as to make unnecessary, from the standpoint of protection of The National City Company's position, the drawing of any further amount against the Morgan credit and the use of further stock from the Special Account for that purpose.

The handling of the Special Account was, during its whole existence, solely in charge of Mr. Baker and during the period in question he used either the Special Account or the Sole Account in purchases and sales of National City stock, as from time to time he found it desirable in the light of The National City Company's cash position and its own retail selling. The sales of 13,650 shares and 17,376 shares credited to the special account on November 1 and November 11, respectively, constituted deliveries of stock out of the special account back to the sole account to take care of retail sales made by The National City Company and credited to the sole account.

The special account was closed on the books of The National City Company on November 13, the final transactions being entered at the figures necessary to close it (as it was carried on the books) with neither profit nor loss. The 28,300 shares delivered to J. P. Morgan & Company were not, however, dealt with on the books of The National City Company otherwise than as above indicated.

Mr. Baker nevertheless recognized that the delivery of these shares to J. P. Morgan & Company did not terminate the obligation of The National City Company in respect of them. On November 4 The National City Company made two sales of 1,000 shares each and one sale of 3,000 shares, upon which it made delivery by tak-

727 ing down stock from J. P. Morgan & Company. It received from the purchasers checks to its order in payment for these shares; it in turn paid the amount of the purchase price by its own check to J. P. Morgan & Company in reduction of the Morgan loan, and against such payment received the shares delivered to the purchasers. Similarly, on November 7, The National City Company made a sale of 5,000 shares, receiving payment from the purchasers, in turn paying the amount of the purchase price on account of the Morgan loan, and receiving, against such payment, the shares which it delivered to the purchasers.

Some days after the Special Account was in effect, and after the delivery of the shares to J. P. Morgan & Company, Mr. Rentschler discussed with you the possibility of expediting the liquidation of the Morgan loan through the sale of large blocks of stock to certain possible purchasers. He told you that he would take 1,000 shares for his own account, mentioned certain others who, he thought, would take substantial amounts, and asked you how much of the stock you felt you could afford to take and hold for your personal account. You told him that if the remainder of the stock should be taken up, you thought you could afford to take 3,000 shares for your personal account. Subsequently, Mr. Rentschler arranged for the purchase from The National City Company by himself and certain others, of a substantial block of stock, the avowed purpose of the arrangement being to reduce your personal liability on the Morgan loan. Mr. Rentschler had always assumed that the shares taken by this group had been taken from the shares in the Morgan loan. In fact, however, that was not done.

728 The above-described transactions resulted in there being left in the Morgan loan 18,300 shares at a net cost (exclusive of interest) of $6,096,179.50.

You have asked our opinion as to the obligation of The National City Company to you upon these facts. In our opinion its obligation was at least to liquidate the Special Account with reasonable diligence, including the stock transferred to J. P. Morgan & Company. We are, however, of the opinion that its obligation extended further, to indemnify you from loss in connection with such liquidation or in connection with the Morgan loan.

It will be noted from Exhibit 1 and Exhibit 2 that in the handling of the Special Account not only was no preference given to it in the liquidation of the National City stock which The National City Company had on hand from time to time, but, on the contrary, preference was given to the Sole Account. During the period from October 29 to November 11 total purchases in the Sole Account, including the 13,650 shares and 17,376 shares transferred to it from the Special Account, were 93,121 shares, while the total sales credited to the Sole Account amounted to 126,993 shares. The net sales credited to the Sole Account in excess of its purchases were, therefore, much more than enough, if applied to the shares purchased in the Special Account, to have closed it out, including those delivered to J. P. Morgan & Company.

Had all the National City Company's purchases and sales of National City stock from October 29 to November 9 been cleared
729 through the Special Account, and had the 28,300 shares delivered to J. P. Morgan & Company been dealt with as if they had remained in the Special Account, which was the real intent, that account, we are advised by Mr. Baker, would have been closed out on November 9 with a profit of $2,142,418.72.

The taking of any such profit by yourself personally would, of course, have been wholly inconsistent with the arrangement as understood by yourself, Mr. Baker, and Mr. Rentschler. That you had no idea of taking any profit for your personal account is confirmed not only by your discussion with Mr. Rentschler, above mentioned, as to the possibility of your taking 3,000 shares for your own account, but also by the statements which we are advised you made to some of the members of the Board of The National City Company at the time of crediting the proceeds of sales, aggregating 10,000 shares, on November 4 and 7, to the Morgan loan. Those sales were at a price materially above the net cost per share of the stock in the Special Account. When you mentioned this fact to some of the directors, they stated to you that they did not think you should make a personal profit in connection with the transaction. Your reply was, in substance, that of course you would not take any substantial profit to yourself but that if, upon the final liquidation of the account it showed a small balance one way or the other, you might take it into your personal account in order to avoid having to pass the transaction through The National City Company's books. While this conversation may not have accurately analyzed the legal technicalities of the transaction, in our opinion, it not only does
730 not detract from, but on the other hand confirms, the conclusion that at all times the transactions were basically for the account of The National City Company, and that all you were doing was temporarily to lend that Company your personal credit.

Assuming even that the duty of The National City Company was limited to liquidating the Special Account with reasonable diligence and that such a duty did not require giving the Special Account complete preference to the extent of clearing through it all purchases and sales after October 29 and until by that method it had been so liquidated, it seems to us that treatment of the Special Account upon an equal basis with the Sole Account in charging purchases and crediting sales after October 29 is something less than the minimum obligation of The National City Company in the premises; and we are advised by Mr. Baker that even with such treatment the Special Account would, before December 20, 1929, have been substantially closed out, and that the loss, if any, from such liquidation would have been small.

Furthermore, we are advised that on December 4, 1929, The National City Company sold all of its then holdings of National City stock, other than that in the Morgan loan, aggregating some 40,000 shares, to the Stock Purchase Plan Corporation, a corporation

organized as a medium for subscriptions by officers and employees to National City stock and that, for a short time, The National City Company was, except for the stock in the Morgan loan, short of National City stock. It seems to us that even a much lower standard of duty than we think would be imposed, required
731 The National City Company at that time to complete the liquidation of the stock then carried on your credit.

We are therefore of opinion that The National City Company is under obligation to take up from the Morgan loan the 18,300 shares of National City stock at their net present cost with adjustment for interest charges and dividends received.

Very truly yours,

CRAVATH, DE GERSDORFF, SWAINE & WOOD.

CHARLES E. MITCHELL, Esq.,
55 Wall Street, New York, N. Y.

Respondent's Exhibit Y

C. E. MITCHELL,
55 WALL STREET,
New York, June 29, 1932.

Mr. HUGH B. BAKER,
President, The National City Company,
55 Wall Street, New York, New York.

DEAR SIR:

On March 11th I submitted to you by letter a statement of facts and opinion of counsel with reference to a loss sustained by me on transactions in National City Bank Stock entered into
732 in the Fall of 1929, in no sense for my own benefit, but entirely for the benefit of the National City Company in the difficult circumstances growing out of the Corn Exchange contract.

I regret that the matter has had to be considered in the light of the legality of any possible claim, for from the very outset I never attempted to press or keep clear the claim on legal lines, and if there be any legal defect in my petition for consideration it results from my continuing desire not to embarrass the Company at any time in any way. That there is a sound moral claim there can be no possible question and I am gratified to learn from those of your Board who have considered the matter that that is universally recognized.

In the depression through which we are now passing, however, I fully realize that any discussion of ways and means for satisfaction of this obligation is inopportune and, though the carrying of the load of this loss is difficult and embarrassing for me, nevertheless, acting in the same spirit which originally prompted the taking on of that load for the Company's benefit, I suggest that it not be further considered now in the light of a claim and that we patiently await more favorable conditions in the affairs of the Company, when a full measure of equity can be accorded me.

Yours very truly,

C. E. MITCHELL.

733 *Respondent's Exhibit Z*

C. E. MITCHELL,
55 WALL STREET,
New York, March 24, 1932.

DEAR ELIZABETH:

You now hold 18,300 shares of the capital stock of The National City Bank of New York, together with certain claims against The National City Company in connection therewith, in respect of which you are now indebted to me in the sum of $3,924,862.

This is to confirm my purchase from you of said shares and claims, in consideration of my releasing you of all liability on account of your present indebtedness to me in connection therewith.

Therefore, please sign and deliver to me the enclosed bill of sale of stock, with the necessary tax stamps attached, upon receipt of which I hereby release you from any further obligation whatsoever in connection therewith.

Please also sign and return to me the enclosed dividend order.

Very truly yours,

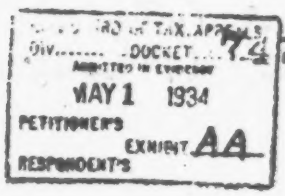
C. E. MITCHELL.

MRS. C. E. MITCHELL,
934 Fifth Avenue, New York, New York.

734

RESPONDENT'S EXHIBIT A A

Ex. 70 Trd. Jrny



March 24, 1932

Dear Charles,

I confirm the sale mentioned in your letter of today and send you herewith, signed and with transfer stamps attached, bill of sale for 18,300 shares of stock of The National City Bank of New York.

The signed dividend order is also returned herewith.

Very truly yours,

Elizabeth T. Mitchell

Mrs. Charles E. Mitchell
55 Wall Street
New York, New York

735

and

W.C.B

		Stamps	
Federal	(4⅞ per 1000. 48¢ per 100)	86.04	
State	(9⅝ per 1000. 96¢ per 100)	172.08	258.12

Stamps should be placed on Bill of Sale and cancelled by seller.

4.70 18

Anderson at 3 o'clock 1 hour

Signed on Schedule Basis

736 *Respondent's Exhibit BB*

MARCH 24, 1932.

Messrs. TAFFT & COMPANY,
In care of THE NATIONAL CITY COMPANY,
20 Exchange Place, New York, New York.

DEAR SIRS:

Please hereafter pay to Charles E. Mitchell, 55 Wall Street, New York City, any and all dividends received by you subsequent to the date hereof on account of The National City Bank shares in your name represented by certificates numbered as per attached list.

Very truly yours,

ELIZABETH R. MITCHELL.

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No. of certificates	Shares per certificate	Total number of shares	No. of certificates	Shares per certificate	Total number of shares
F 80718/25	8 @ 10	80	H 873/4	2 @ 5,000	10,000
F 81068/71	4 @ 5	20	H 875	1 @ 3,000	3,000
G 18454/8	5 @ 100	500	H 876	1 @ 238	238
G 18491	1 @ 100	100	F 79709	1 @ 2	2
G 18509	1 @ 100	100	F 79998	1 @ 3	3
G 18499/508	10 @ 100	1,000	F 79689/93	5 @ 3	15
G 18472	1 @ 100	100	F 79695/708	14 @ 3	42
G 18462	1 @ 100	100	G 18430/49	20 @ 100	2,000
G 18464/6	3 @ 100	300			
G 18423/9	7 @ 100	700	Total		18,300

738

RESPONDENT'S EXHIBIT CC.

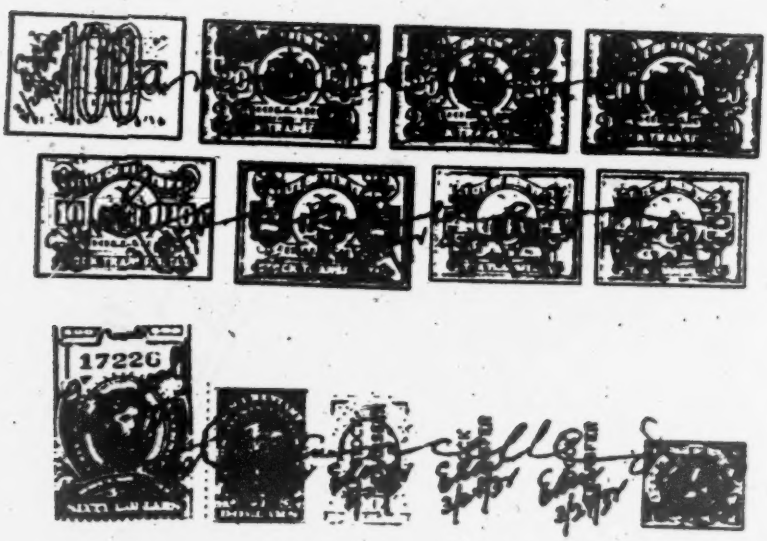
Govt Ex 37

BOARD OF TAX APPEALS
DOCKET NO. 74720
FILED MAY 1 1934
PETITIONER'S EXHIBIT CC
RESPONDENT'S

New York, March 24, 1932

Sold to CHARLES E. MITCHELL eighteen thousand three hundred (18,300) shares of capital stock of The National City Bank of New York

Charles E. Mitchell



P1

739

RESPONDENT'S EXHIBIT D D

U. S. BOARD OF TAX APPEALS
DOCKET 72720
MAY 1 1934
PETITIONER'S
EXHIBIT DD
RESPONDENT'S

Ex. 73 T.D. Jam

C. E. MITCHELL
55 WALL STREET
NEW YORK

March 25, 1932

U S [illegible] Court, S [illegible] Y.

PERSONAL & CONFIDENTIAL

Dear Mr. Bradford,

You may want to put into a sealed envelope, to be carried in Mrs. Mitchell's files, the enclosed papers having to do with the passage of title of 18,300 shares of National City Bank stock and a release from debt thereon.

You will note that from this time on there will be no interest payments due from Her or dividend entries.

A brief acknowledgment sent to me under confidential cover will be appreciated.

Yours very truly,

C. E. Mitchell

Mr. Lindsay Bradford, Vice President
The City Bank Farmers Trust Company
22 William Street
New York, New York

Enclosures

740

RESPONDENT'S EXHIBIT EE

City Bank Farmers Trust Company

22 William Street

New York March 25, 1932

PERSONAL AND CONFIDENTIAL

Dist. Sec.
S. D. N. Y.
Dept.

Dear Mr. Mitchell:

This will acknowledge your letter of March 25th, 1932, enclosing a certain letter from you to Mrs. Mitchell, together with other papers, all of them apropos of the transfer of title of 18,300 shares of National City Bank stock from Mrs. Mitchell to yourself.

We have made due note of the fact that previous arrangements in regard to interest payments and dividend receipts are no longer in force.

For your information, we have placed the papers which you enclosed in a sealed envelope and placed the envelope in Mrs. Mitchell's files.

Yours very truly,

Lindsay Bradford
Vice President.

U. S. BOARD OF TAX APPEALS
DIV. ... DOCKET 74720
ADMITTED IN EVIDENCE
MAY 1 1934
PETITIONER'S EXHIBIT EE
RESPONDENT'S

Mr. Charles E. Mitchell
55 Wall Street,
New York, New York.

741 *Respondent's Exhibit FF*

FEBRUARY 8, 1921.

A meeting of the Board of Directors of The National City Company was held at 55 Wall Street, New York, February 8, 1921.

There were present: Mr. Mitchell, Mr. Swenson, Mr. Rockefeller, Mr. Grace, Mr. Rich, Mr. Winthrop and Mr. Crews: also as officers of the Company Mr. George H. Church, Vice President, and Mr. Charles S. Wall, Secretary.

Mr. Mitchell presided and Mr. Wall acted as Secretary of the meeting.

The minutes of the meeting held February 1st were read and approved.

On motion, duly made and seconded, the following resolution was adopted by unanimous vote.

Whereas, it is deemed to be in the interests of the Company that a profit sharing plan for the Management for the year 1921 should be determined upon and adopted at this time.

Be it Resolved: I. A management fund shall be established and computed as follows—from the net profits of the year 1921, prior to deduction of such management fund or dividends but after deduction of reserves for depreciation, insurance, and corporate, federal and state taxes, there shall be subtracted a sum equal to eight percent (8%) on the average quarter year aggregate of capital, surplus and undivided profits and of the balance remaining twenty percent shall be set aside as the management fund and entered as an item of expense against the year's profits.

742 II. Such fund shall be disbursed to the Executives—to wit, the President, Vice Presidents and Assistant to the President in addition to their salaries as follows—one half in accordance with fixed percentages to be forthwith established by the Executive Committee for Executives now holding office, such percentage to be made known to the General Auditor and to the individual Executives, and the remaining one half of the fund to Executives of similar class holding office at the close of the year on the basis of what, in the opinion of the Executive Committee, each such Executive has relatively contributed to the advancement of the Company's interests during the year and without regard to the relative salaries paid or the percentages of division of the first one half of the fund. The Executive Committee in its discretion may forthwith fix the percentage of participation of the President for the second as well as the first half of the fund.

III. If the services of any Executive shall terminate during the year either by his own volition or that of this Board, he shall participate in the management fund as to either half only to an extent to be determined by the Executive Committee.

IV. All matters of every character pertaining to the computation and division of the management fund under the general provisions of this resolution and the time or times of payment from the fund when established or on account thereof prior to final establishment

shall be unrestrictedly within the discretion of the Executive Committee.

743 On motion duly made and seconded, the action of the officers in signing on behalf of this Company, a loan agreement of the New York Life Insurance Company was approved.

There was submitted a Consolidated Balance Sheet as at January 31, statement of contingent assets and liabilities as at January 31, statement and consolidated statement of income, undivided profits and surplus for January 1920 and 1921, consolidated comparative statement of classified expenses for January 1920 and 1921, and statement of transactions for the week ended February 3, 1921.

On motion the meeting then adjourned.

CHARLES S. WALL, *Secretary.*

Respondent's Exhibit GG

JANUARY 25, 1927.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on January 25, 1927.

There were present: Mr. Mitchell, Mr. Swenson, Mr. Grace, Mr. Winthrop, Mr. Stillman, Mr. Brady and Mr. Rentschler; also Mr. Charles S. Wall, Secretary.

Mr. Mitchell presided and Mr. Wall acted as Secretary of the meeting.

The minutes of the meeting held January 18th were read and approved.

The President submitted the following report, which was ordered incorporated in the Minutes:

744 On motion, duly made and seconded, it was unanimously

Resolved, That an Interim Dividend of 2% be paid February 15, 1927, on the capital stock of this Company out of its accumulated income and profits to The National City Bank of New York, for the credit of the stockholders of record of this Company at the close of business February 5, 1927.

On motion, duly made and seconded,

Be it Resolved, that for the year 1927, there be set up a reserve account out of Current Earnings for a "Management Fund," to be determined as follows:

The term "Current Earnings" is defined as constituting the net operating income of the month, after current charges for depreciations or write-offs, taxes, or other reserves authorized by this Board. From Current Earnings so determined, there shall be deducted each month an amount figured at the rate of 8% per annum on the average quarter year aggregate of Capital, Surplus, and Undivided Profits (except for the purpose of this computation, the stock of the General Sugar Corporation, which it is intended to introduce into the Balance Sheet on or about February 15, 1927, in the amount of $25,000,000, shall not be considered as a part of Capital, Surplus, and Undivided Profits, and any dividends or returns thereon shall

not be considered as a part of Current Earnings); then an amount equal to 20% of any remainder of such Current Earnings for the month shall be credited to the Management Fund.

745 Be it Further Resolved, that at the close of the current year or at any time, or from time to time during the year, the Executive Committee shall be empowered to make distribution of the said Management Fund to operating executive officers of Presidential or Vice Presidential rank, as follows: One-half of the Management Fund shall be distributed in accordance with fixed percentages to be forthwith established by the Executive Committee for executives now holding office, the percentage that each eligible officer shall be assigned to be made known to him personally, and all percentages to be advised to the Comptroller over the signatures of the Chairman and President. The remaining one-half of the Management Fund shall be distributed to executives of similar class, holding office at the close of the year, in such proportion as in the unrestricted judgment and discretion of the Committee may seem wise and proper as representing the ratable contribution of each such executive to the development and profitable progress of the Company during the year. In order that the Executive Committee may have the benefit of the unbiased opinion and advise of the President with respect to the distribution of that portion of the Fund referred to in the foregoing sentence, the percentage of participation of the President for the year 1927, in the entire Fund, shall be fixed by the Executive Committee forthwith.

Be it Further Resolved, that these resolutions shall not be construed as a contract or as creating vested rights, and that full discretion is reserved to this Board to modify, amend, alter, or

746 repeal these resolutions at any time, and to determine any and all questions arising thereunder, including what, if any, participation any executive shall have in the Management Fund, as to either half thereof, in case his services to the Company shall be terminated during the year either by his own volition or that of this Board, and the President shall so advise each executive in writing.

Be it Further Resolved, that these resolutions be deemed standing resolutions, and apply not only to the year 1927, but to each year thereafter until further or otherwise ordered by this Board.

The President reminded the Board that for several years up to and including 1920, it had been the custom of the Company to pay, annually, bonuses or gratuities to the entire staff of the Company, including executive officers, and that commencing with the year 1921, it was determined to eliminate the bonus or gratuity system and that at the outset of that year resoluions were passed by the Board establishing the so-called "Management Fund" for senior executives, and that a system or plan was at that time accepted whereby a fund would be set up out of current earnings which should constitute a profit sharing basis for sales office managers and department heads concerning which eligible participants were advised and which constituted a part of their compensation to which they would be entitled

under certain conditions and restrictions. This plan, which has from time to time been modified but each year approved in general form by the Board of Directors, has been, in general, as follows:

747 A margin of profit, determined by factors of actual profit in Head Office, degree of sales resistance, condition of the times, etc., and entirely in the discretion of Head Office executives, has been established for each and every security offered by the organization through the sales offices. From the aggregate of such margins, constituting gross sales office profits, there has been deducted for each office its direct expenses, and a percentage of Head Office or indirect expense determined as proper in the discretion of Head Office executives. Of the net sales office profits thus determined, 15% has been carried to a Profit Sharing Fund for division among sales office managers and others. A further sum, at the rate of $2,500 per month, or $30,000 per year, following a precedent established prior to 1921, has been set aside from net operating income at Head Office, for distribution among Department Heads and Junior Officers at Head Office. A further sum of 4% of the net profits of the Acceptance Department, remaining after deduction of direct and indirect expenses, has been set aside for distribution to the Head of the New York Acceptance Department and his Assistant. And a further sum of 5% of the net Acceptance profits of the Acceptance Departments of the Boston, Chicago, and San Francisco Offices has been set aside for distribution among the Department Heads in each of those branches controlling the Acceptance business.

While the Profit Sharing Fund has been established from an accounting standpoint, year after year, as above set forth—in practice it has been found generally desirable to consider the accumu-

748 lated Fund as one total and distribution has been made therefrom to Sales Office Managers, Junior Officers, the Head of the Acceptance Department and his Assistants, the Trader and Assistant Traders, and certain staff members whose work in the interest of the Company has been outstanding during the period under review, and such distribution has been made in the sole discretion of the Senior Officers upon the approval of the President.

In view of the foregoing, the President recommended that the practice of establishing a Profit Sharing Fund from net sales office profits as in the past, be continued for the year 1927; that the calculations established on Acceptance Departments profits be eliminated; and that the fund of $30,000, heretofore established for Junior Officers and Department Heads, be increased for the year to $3,000 per month, or $36,000 per annum, subject to review at the close of the year in case the President desires to present a request at such time for modification, and that the total of the funds so established be distributed at the close of the year, not as a gratuity, but as additional compensation to those who are at such time considered to be eligible.

Whereupon, on motion duly seconded and carried, it was

Resolved, that the foregoing recommendation of the President, with respect to a Profit Sharing Fund for Sales Office Managers, Junior Officers, Department Heads, and those members of the staff who have contributed during the year most effectively to the development and profitable progress of the Company, be and hereby is
749 approved, and the proper officers are hereby authorized to set up a reserve for such Fund monthly, and the President and Senior Officers are authorized to make distribution thereof at the close of the year as, in their sole discretion, seems wise and proper.

Further Resolved, that these resolutions be deemed standing resolutions and continue in effect from year to year until further or otherwise ordered by this Board, but that these resolutions shall not be construed as a contract or as creating vested rights, and that full discretion is reserved to this Board to modify, amend, alter or repeal these resolutions at any time, and to determine any and all questions arising thereunder.

The Executive Committee reported to the Board that at its meeting today the percentage of the President, in the Management Fund for the year 1927, had been definitely established, and that the percentage in the first half of the Management Fund for the year 1927, for Vice Presidents, had been established, and

Further that the Chairman of the Board and the President had been requested to advise, over their signatures, the Treasurer and the Comptroller, of the percentages determined upon.

The President presented preliminary drawings and cost estimates for a new building to be erected at #52 Wall Street, and requested from the Board instructions as to the size of building desired and any suggestions with regard to the character thereof; and he further presented a minute from the meeting of the Executive Committee of the Board of Directors of The National City Bank, at their
750 meeting as of even date, recommending to the Board of the National City Company that in view of the requirements of the National City Bank, and the fact that they will be the principal tenants of the building, the National City Company proceed with the erection of a thirty-one story building at the said location.

After discussion, on motion duly seconded, it was

Resolved, that the proposal to erect a thirty-one story building at #52 Wall Street, at an estimated cost, including banking fixtures and safe deposit equipment, of Five million ($5,000,000.) Dollars, be and hereby is approved, and the President and proper officials of the National City Company are authorized to proceed with the completion of plans and the letting of contracts incident to the erection of such building, with the understanding that demolition of the present building shall commence on May 1, 1927; with expectation of completion of the new building by May 1, 1928.

There was submitted Condensed Consolidated Balance Sheet as at December 31, 1926, Consolidated Comparative Statement of Income, Undivided Profits and Surplus for December 1926, and twelve months of 1926 and 1925, Consolidated Comparative Statement of

Classified Expenses for December and twelve months of 1926 and 1925, and statement of confirmed sales and purchases for the week ended January 20, 1927.

On motion, the meeting then adjourned.

CHARLES S. WALL, *Secretary.*

751 *Respondent's Exhibit HH*

JANUARY 2, 1929.

A meeting of the Board of Directors of the National City Company was held at No. 55 Wall Street, New York City, on January 2, 1929.

There were present Mr. Mitchell, Mr. Swenson, Mr. Grace, Mr. Brady, Mr. Rentschler, and Mr. Winston, also Mr. Charles S. Wall, Secretary.

Mr. Mitchell presided and Mr. Wall acted as Secretary.

The minutes of the meeting held December 26th were read and approved.

The President reported that the figures with respect to Management Funds, for the year 1928, and his recommendations for distribution thereof had been submitted to the Executive Committee, which had approved the same.

There was submitted a statement of confirmed sales and purchases for the week ended December 27, 1928.

On motion the meeting then adjourned.

CHARLES S. WALL, *Secretary.*

752 *Respondent's Exhibit II*

JANUARY 3, 1929.

Memorandum to Mr. Bradley, Treasurer

Will you please make disbursement from the Management Fund at this time, of the balance of the "First Half" in accordance with the fixed percentages, and also of the "Second Half," in total amount as follows:

C. E. Mitchell, $483,333.33.

C. E. MITCHELL, *President.*

E. P. SWENSON, *Chairman.*

Respondent's Exhibit JJ

JANUARY 8, 1929.

A meeting of the Executive Committee of the National City Company was held at No. 55 Wall Street, New York City, on January 8, 1929.

There were present: Mr. Mitchell, Mr. Swenson, and Mr. Grace.

Mr. Mitchell presided.

The percentage of the President in the Management Fund for the year 1929 was definitely established and the percentage in the first half of the Management Fund for the year 1929 for Vice Presidents, was established.

753 The Chairman and the President were requested to advise, over their signatures, the Treasurer and the Comptroller of the percentages determined upon.

On motion the meeting then adjourned.

CHARLES S. WALL, *Secretary.*

Respondent's Exhibit KK

JANUARY 8, 1929.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on January 8, 1929.

There were present Mr. Mitchell, Mr. Swenson, Mr. Grace, Mr. Brady, Mr. Stillman, Mr. Rentschler, and Mr. Winston, also Mr. Maguire, Asst. Secretary.

Mr. Mitchell presided and Mr. Maguire acted as Secretary.

The minutes of the meeting held January 2nd were read and approved.

On motion, it was

Resolved, that the plan for the establishment of Management Funds as set forth in resolution of this Board dated January 25th, 1927, is hereby reapproved and adopted for the year 1929 in each and every respect, including method of distribution thereof, and the officers are hereby authorized and instructed to set up monthly reserves therefor.

The President stated that he had requested the help of the

754 officers in establishing percentages to be allotted to each eligible officer for the coming year, that he had requested an unsigned ballot with respect to the allotment to the President for the year 1929 and a signed ballot for percentage allotments to other officers with respect to one-half of the Fund and he presented the compilation of the Comptroller of the Company who had received these ballots. The Board thereupon gave consideration to the percentage allotment to the President and having determined the figure considered the Comptroller's compilation of officer's votes and the President's recommendations with respect to the allotment of percentages to other eligible officers for the first half of the Fund, and a determination thereof having been reached, it was

Resolved, that the Chairman of the Board and the President are authorized over their signatures to advise the Treasurer and the Comptroller of the Company of the determinations of the Board and the President is authorized to advise each officer privately of the percentage alloted to him.

There was submitted a statement of confirmed sales and purchases for the week ended January 3, 1929.

On motion, the meeting then adjourned.

J. S. MAGUIRE, *Secretary.*

755 *Respondent's Exhibit LL*

JANUARY 9, 1929.

Memorandum for Mr. Bradley

For your records we have to advise you that the Executive Committee has approved fixed percentages in the Management Fund for 1929 as follows:

For C. E. Mitchell—a percentage applying on both the first and second half of the Management Fund for 1929	33⅓%
For the following—a percentage applying to the first half of the Management Fund only:	
W. R. Morrison	2½%
H. B. Baker	11 %
G. D. Buckley	3⅜%
R. N. Byrnes	8½%
P. V. Davis	4 %
L. E. Olwell	3½%
G. S. Rentschler	6½%
J. P. Ripley	7½%
S. A. Russell	8½%
V. S. Schoepperle	3 %
H. C. Sylvester	2½%
G. K. Weeks	5½%
Total	100 %

C. E. MITCHELL, *President.*

E. P. SWENSON, *Chairman.*

756 *Respondent's Exhibit MM*

JUNE 25, 1929.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on June 25, 1929.

There were present: Mr. Mitchell, Mr. Swenson, Mr. Winthrop, Mr. Stillman, Mr. Brady, and Mr. Rentschler; also Mr. Maguire, Assistant Secretary.

Mr. Mitchell presided and Mr. Maguire acted as Secretary of the meeting.

The minutes of the meeting held on June 18 were read and approved.

The Secretary reported that a Certificate of Increase of the capital stock of the Company, duly executed by the Trustees under the Agreement of June 1, 1911, as amended, as holders of all of the outstanding capital stock, had been duly filed in the office of the Secretary of State and a duplicate original thereof in the office of the Clerk of New York County, and the tax paid thereon, so that the authorized capital stock of the Company is now $55,000,000.

The Secretary submitted a letter of indemnity, dated June 6, 1929, addressed to Messrs. Charles A. Peabody, James H. Perkins, Lewis L. Delafield, Charles D. Dickey, and James L. Loomis, as the Committee under the Farmers' Loan and Trust Company Stock Deposit and Reorganization Agreement, dated May 9, 1929, and signed by Mr. H. B. Baker, as President of this Company, by the terms of which this Company undertakes to indemnify and hold harmless the members of the said Committee from all liability on ac-
757 count of anything which may be done by them, under the advice of counsel, in connection with, or for the purpose of carrying out, the plan for effecting the affiliation of The Farmers' Loan and Trust Company, as the City Bank Farmers Trust Company, with The National City Bank of New York and with this Company. The said letter was read, after which, on motion, it was

Resolved, that the letter of indemnity to the members of the Stockholders Committee, acting under The Farmers' Loan and Trust Company Stock Deposit and Reorganization Agreement, dated May 9, 1929, now submitted, and the action of the President in executing and delivering the same to said Committee, are hereby approved, ratified, and confirmed.

The Chairman reported that as a step in the plan for effecting the affiliation of the Farmers' Loan and Trust Company, as the City Bank Farmers Trust Company, with The National City Bank of New York and with this Company, a total of 4,720 shares of the capital stock of City Bank Farmers Trust Company, out of the 5,000 shares now outstanding, being all except the shares required to qualify the present seven Directors and the Board of twenty-one Directors named in the Merger Agreement, had been acquired by this Company at an aggregate cost of $948,515.47.

On motion, the acquisition of said stock on said terms was in all respects approved.

The Chairman suggested that the things remaining to be
758 done by this Company in pursuance of said plan might well be authorized at this time in order that they may be done without delay, as soon as the pending merger of the Farmers' Loan and Trust Company and the City Bank Farmers Trust Company and the pending consolidation of The Farmers' Loan State Bank and The National City Bank of New York take effect.

In connection therewith, the Chairman submitted, for the information of the Board, a proposed amendment to be dated June 28, 1929, of the Agreement, dated June 1, 1911 (and amended April 15, 1920), between The National City Bank of New York and James Stillman and others, relating to the stock of this Company, which said Amendment is to be made and consented to by the Trustees acting under said Agreement and by the holders of more than two-thirds in interest of the Capital stock of The National City Bank of New York, holding stock certificates indorsed as prescribed in said amended Agreement. He also submitted a proposed Trust Agreement, to be dated June 28, 1929, and to be executed by this Company and by Eric P. Swenson, John A. Garver, and John D. Ryan, as Trustees,

and by James A. Stillman, Percy A. Rockefeller, and Beekman Winthrop, as the Trustees under said Agreement of June 1, 1911, as intended to be amended by said Amendment to be dated June 28, 1929. The said Amendment of the said Agreement of June 1, 1911, and the said Trust Agreement, were read and duly considered and copies thereof were ordered affixed to the minutes of this meeting as part of such minutes.

Thereupon, on motion, it was

759 Resolved, that if and when the pending merger of The Farmers' Loan and Trust Company and the City Bank Farmers Trust Company takes effect, the officers be and are hereby authorized to acquire from the Directors of the present City Bank Farmers Trust Company who will then cease to hold office their qualifying shares of stock in the said Trust Company, and to exchange the entire 4,700 shares which this Company will then own for 23,950 shares of $20 par value each of the capital stock of the merged institution.

Resolved, that, if and when the said pending merger of The Farmers' Loan and Trust Company and the City Bank Farmers Trust Company, and also the pending consolidation of The Farmers' Loan State Bank and the National City Bank of New York both take effect, this Company acquire from Charles A. Peabody and others, as the Stockholders, Committee designated in the Farmers Loan and Trust Company Stock Deposit and Reorganization Agreement, dated May 9, 1929, 475,000 shares of $20 par value each, aggregating $9,500,000 par value, of the stock of City Bank Farmers Trust Company, the merged institution, for the purpose of forthwith distributing the beneficial interest therein to the stockholders of this Company, namely, the Trustees under the Agreement of June 1, 1911, as intended to be amended by the said Amendment to be dated June 28, 1929, and, through them, to the persons having the beneficial interest in the stock of this Company, namely, the holders of the $110,000,000 par value of the capital stock of The National City Bank

760 of New York which will then be outstanding, but upon and subject to the terms and provisions of the Trust Agreement hereinbefore referred to; and that in payment therefor this Company issue and deliver to said Committee, or its nomine or nominees, 50,000 shares of $100.00 par value each, aggregating $5,000,000 par value, of the capital stock of this Company, all to be issued as fully paid and non-assessable, the fair value of the stock so to be acquired being, in the judgment of this Board, in excess of the par value of the stock so to be issued in payment therefor:

Resolved, that immediately upon the acquisition by this Company of the said stock of City Bank Farmers Trust Company, and provided that previously or simultaneously therewith, the said Charles A. Peabody and others, as the Stockholders Committee designated in The Farmers' Loan and Trust Company Stock Deposit and Reorganization Agreement, dated May 9, 1929, shall have delivered, or shall deliver, to the Trustees under the Agreement of June 1, 1911, as intended to be amended by the said Amendment to be dated June 28, 1929, 50,000 shares, aggregating $5,000,000 par value, of the cap-

ital stock of this Company, to be held by said Trustees with the rest of the stock of this Company for the purposes and upon the trusts declared in the said Agreement of June 1, 1911, as intended to be amended as aforesaid, all of the stock of said City Bank Farmers Trust Company then owned by this Company, aggregating 498,950 shares out of the 500,000 shares which will then be outstanding, be assigned, transferred and delivered to the said Eric P.
761 Swenson, John A. Garver and John D. Ryan, as Trustees under the said Trust Agreement hereinbefore referred to, and that the beneficial interest therein be and by the fact of the delivery of the said stock to such Trustees shall be, distributed, pro rata, to the stockholders of this Company, namely, the Trustees under the said Agreement of June 1, 1911, as intended to be amended as aforesaid, and, through them, to the persons having the beneficial interest in the stock of this Company, namely, the holders of the $110,000,000 par value of the Capital stock of The National City Bank of New York which will then be outstanding, but upon and subject to all the terms and provisions of the said Trust Agreement.

Resolved that the proper officers of this Company are hereby authorized and instructed to execute the said Trust Agreement, in the name and on behalf of this Company and under its corporate seal, and to procure the acceptance of the trust therein set forth, and the execution thereof, by Messrs. Eric P. Swenson, John A. Garver, and John D. Ryan, and likewise to procure the execution thereof by the said Trustees under the Agreement of June 1, 1911, as intended to be amended as aforesaid, and thereupon to transfer and deliver to Messrs. Eric P. Swenson, John A. Garver, and John D. Ryan, as Trustees thereunder, the said 498,950 shares of the capital stock of said City Bank Farmers Trust Company.

The Chairman asked the Board to consider the advisability of transferring the sum of $5,000,000 from undivided profits to
769 surplus, as and when the transactions referred to in the foregoing resolutions shall be completed, in order that the surplus may be the same amount as the capital, namely, $55,000,000.

After discussion, on motion, it was

Resolved, that as and when the outstanding capital stock of this Company shall be increased to $55,000,000 by the issuance of $5,000,000 par value thereof for the acquisition of stock of City Bank Farmers Trust Company, in accordance with the resolution previously adopted, the sum of $5,000,000 be transferred to surplus account from undivided profits, in order to increase the surplus to $55,000,000.

On motion, duly made and seconded, it was

Resolved, that the Chairman, the President, or any Vice-President be authorized to sign, execute, and deliver in the name of this corporation from time to time as occasion may arise a proxy or proxies authorizing a person or persons named therein to vote stock owned by this corporation at any general or special meeting of the shareholders of the General Sugar Corporation, and, in the absence of specific directions on the subject from this Board to instruct such representatives as to the manner in which such stock shall be voted.

On behalf of the Trustees acting under the Agreement and Declaration of Trust dated February 15, 1927, relating to the Officers and Employees Stock Trust, the Chairman reported the purchase on June 25, 1929, of four thousand (4,000) additional shares of the capital stock of the Bank at $385 per share, making a total of 11,701 owned by the said Trustees as of this date and costing them an average price of approximately $171.84 per share. He requested that this purchase be approved.

763 Thereupon, on motion, duly seconded, it was

Resolved, that the purchase by said Trustees of four thousand (4,000) additional shares of the capital stock of the Bank on June 25, 1929, on the terms reported by the Chairman, be and is hereby approved, ratified, and confirmed.

The Chairman reported that the accumulations in the Management Fund for the first six months of the year 1929 would aggregate approximately 2,900,000, whereupon, after discussion, it was

Resolved, there be distributed from the accumulations in the Management Fund on July 1st an amount figured in accordance with the fixed percentages established for eligible officers at the outset of the year, on the basis of a sum of $2,000,000 but owing to the continuous absence during the period of Messrs. Schoepperle and Sylvester the amounts which would have been payable to them under their fixed percentages should not be paid, and further, owing to the resignation of Gordon S. Rentschler as a Vice-President and Assistant to the President during the period, the amount payable to him should be in the sum of $100,000 instead of the larger amount payable under his fixed percentage, and further, be it

Resolved, that upon approval of the Chairman and/or Vice President Mayer, the Treasurer is hereby authorized to make disbursements of the said sums on July 1st, 1929.

There was submitted a statement of confirmed sales and purchases for the week ended June 20, 1929.

On motion, the meeting then adjourned.

J. MAGUIRE, *Secretary.*

764 *Respondent's Exhibit NN*

JUNE 27, 1929.

Mr. S. W. BALDWIN, *Treasurer;*

In accordance with the resolution passed by The Board of Directors at the meeting held June 26, 1929, will you please make disbursement from the Management Fund at this time, of the following amounts:

Mr. C. E. Mitchell	$666,666.67	Mr. G. S. Rentschler	$100,000.
" H. B. Baker	220,000.	" G. D. Buckley	73,333.33
" R. M. Byrnes	170,000.	" J. P. Ripley	150,000.
" G. K. Weeks	110,000.	" W. R. Morrison	50,000.
" P. V. Davis	80,000.		
" L. E. Olwell	70,000.	Total	1,860,000.00
" S. A. Russell	170,000.		

C. E. MITCHELL, *Chairman.*

H. F. MAYER, *Vice-President.*

765 *Respondent's Exhibit OO*

THE NATIONAL CITY COMPANY,
NATIONAL CITY BANK BUILDING,
New York.

Cable address "Nacicto"

Received on July 1, 1929, from The National City Company $666,666.67, which represents an overpayment to me of my share for the year 1929 in the Management Fund, and which is to be repaid by me from future additions to the said Management Fund, before I become entitled to any further payments therefrom.

C. E. MITCHELL.

Respondent's Exhibit PP

DECEMBER 30, 1929.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on December 30, 1929.

There were present: Mr. Mitchell, Mr. Swenson, Mr. Winthrop, Mr. Perkins, Mr. Rentschler, Mr. Winston, and Mr. Stillman.

Mr. Mitchell presided.

The minutes of the meeting held on December 24th were read and approved.

The Chairman presented to the Board estimates of the operations for the year 1929 and discussed with the Board in detail the
766 principal items in the security inventory. The following resolutions were duly adopted:

Resolved, that this Company carry on its books as of December 31, 1929, its current or trading inventory at the lower of cost or market as of said date. Be it further

Resolved, that in view of the character of the inventory carried in No. 55 Account which represents long time investments or investments for purposes other than trading, the inventory continue to be carried on the books of the Company at the figures for such inventory now on the books.

The Chairman then discussed the status of the Management Fund with particular reference to the distribution made of this fund at the close of the first six months of the current year, and the status of the fund after the results of the whole year were taken into account. After discussion the following resolution was duly adopted:

Resolved, that the share which each of the executives of this Company received in the distribution of the first half of the Management Fund of 1929 be debited against each of such officers respectively on the books of this Company to be repaid by each of them out of any distributive share of the Management Fund which each of such officers may be entitled to receive in any year subsequent to the current year 1929.

767 The Chairman stated that the subscription applications for shares of stock of The National City Bank of New York received from employees and eligible officers of The National City Bank of New York, The National City Company, City Bank Farmers Trust Company, and their respective subsidiary corporations, under the Four Year Instalment Payment Stock Purchase Plan, which was approved by this Board on December 3, 1929, ran to a total of more than 100,000 shares, and that after giving preference to the applications of the lower salaried group under Section 1 and of the intermediate group under Sections 1 and 2, there would remain only enough stock to take care of the applications of officers under Section 2 up to and including the rank of Assistant Vice-President in the Bank and corresponding ranks in this Company and in the Trust Company, leaving no stock for allotment to eligible senior officers of said institutions.

He stated that in view of this situation the Trustees of the Officers' and Employees' Stock Trust now recommend that they be authorized to cause the Stock Purchase Plan Corporation to acquire from or through this Company an additional 10,000 shares of stock of the Bank, at $220 per share, for the purpose of allotting the same for subscription, at the said price of $220 per share, to eligible officers of the allied institutions who will be left out of, or inadequately provided for under, the original plan, on the following terms: Each subscriber to pay $10 per share in cash at the time of subscription, a further instalment of six per cent of his subscription on July 1, 1930, six further instalments of six per cent each on the first

768 days of each succeeding January and July, to and including July 1, 1933, and the balance on January 1, 1934, meanwhile paying interest at the rate of five per cent per annum on the unpaid balance of the subscription, and with the same provisions as to anticipating any of such payments, the crediting of dividends and proceeds of "rights" against the subscription, the right to draw down stock which has been fully paid for after January 1, 1932, but not before, and adjustment in the event of death or leaving the service before the stock is fully paid for, as in the original plan. The Chairman further stated that the bank was prepared to purchase an additional $1,900,000, face value, of the Five Per Cent Debentures of the Stock Purchase Plan Corporation, and that this Company will be required to subscribe for 2,000 additional shares of its Preferred Stock at par. He pointed out that this proposed enlargement of the original plan did not call on the allied institutions for any material additional contributions, as the interest payable by the subscribers would carry the interest and dividends on the Debentures and Preferred Stock of the Stock Purchase Plan Corporation. He also stated that this proposed transaction had already been approved by the Executive Committee of the Board of Directors of City Bank Farmers Trust Company and would be acted upon at the regular meeting of the Board of Directors of the Bank to be held tomorrow.

The matter was then fully discussed, after which,
On motion, it was,

Resolved, subject to concurrent action being taken by The
769 National City Bank of New York, that the Trustees of the Officers' and Employees' Stock Trust constituted under the Agreement and Declaration of Trust, dated February 15, 1927, and Supplemental Agreement, dated December 16, 1929, are hereby authorized and empowered to cause the Stock Purchase Plan Corporation to acquire an additional 10,000 shares of stock of The National City Bank of New York for the purpose of permitting eligible officers of the allied institutions who will be left out of, or inadequately provided for under, the original Four Year Instalment Payment Stock Purchase Plan to subscribe therefor on the terms set forth by the Chairman and to cause the Stock Purchase Plan Corporation to issue the additional amounts of Debentures and Preferred Stock mentioned by the Chairman, and generally to do all such acts and things as in their discretion they may deem necessary or proper for the purpose of carrying into effect the enlargement of the Four Year Instalment Payment Stock Purchase Plan now proposed;

Further resolved, that the officers of this Company are hereby authorized to sell and deliver to the Stock Purchase Plan Corporation an additional 10,000 shares of stock of The National City Bank of New York at $220 per share, and to cause this Company to subscribe for and purchase at par an additional 2,000 shares of the Preferred Stock of said Stock Purchase Plan Corporation.

On motion, the meeting then adjourned.

CHARLES S. WALL, *Secretary.*

770 *Respondent's Exhibit QQ*

JANUARY 9, 1930.

A meeting of the Board of Directors of the National City Company was held at No. 55 Wall Street, New York City on January 9, 1930.

There were present: Mr. Mitchell, Mr. Swenson, Mr. Rockefeller, Mr. Winthrop, Mr. Perkins, Mr. Winston, and Mr. Stillman.

Mr. Mitchell presided.

The Chairman discussed the Management Fund for the year 1930. After discussion the following resolution was duly adopted:

Resolved, that commencing as of January 1, 1930, for the purpose of determining the Management Fund for distribution to the executive officers of the Company, all securities including those in syndicate accounts be taken at the lower of cost or market and all securities in the No. 55 Account be taken at market. Further

Resolved that the basis of division as between the executive officers with reference to the first half of the fund during 1929 be continued during 1930 as to those officers receiving advances from management funds in July 1929 and until rescinded and revised by this Board. Further

Resolved that after the distribution made among the executive officers in July 1929 has been repaid to the Company out of the Management Fund accumulated and distributed subsequent
771 to December 31, 1929, the Board again consider the Management Fund in all its phases and reestablish the basis for future distributions as at such time seems just and equitable.

The Chairman then discussed the form of his proposed report to the shareholders of the National City Bank of New York in so far as such report had reference to the affairs of the Company and the form thereof was informally approved.

On motion, the meeting then adjourned.

CHARLES S. WALL, *Secretary.*

Respondent's Exhibit RR

THE NATIONAL CITY COMPANY,
NATIONAL CITY BANK BUILDING,
New York, January 18, 1930.

Office of the Chairman
Mr. W. R. MORRISON,
New York Office.

DEAR MR. MORRISON: In July 1929, when it appeared that the accumulations in the Management Fund for the year would be substantial, there was advanced to you on account thereof the sum of
772 $50,000. The events of the last quarter year have wiped out the accumulation of the Management Fund, and accordingly you have been debited on the books with the amount advanced to you in July, and this debit will stand until it can be paid from distribution to you of future accumulations in Management Fund.

For your information for purposes of figuring the Management Fund, until such repayment is made, the Board of Directors have voted that all accounts on January 1st shall be regarded as having value of cost or market, whichever the lower, except those items which rest in the long term investment account, generally referred to as Account #55, in which account securities shall be considered as having the market value as of December 31st.

Furthermore, the Directors have voted that percentages that were given to officers as to the first half of the Fund for the year 1929, shall apply for the year 1930 as to those officers who received a portion of the distribution in July 1929, and to no others, until such time as the accumulations in the Management Fund are sufficient to make the repayments to the Fund of the amounts disbursed at that time. When such accumulation and distribution shall have taken place, the Directors will consider anew the subject of the Management Fund and the methods of accumulation therein, and will assign such percentages to all eligible officers as in their judgment seem proper.

Yours very truly,

CHAS. E. MITCHELL, *Chairman.*

773 *Respondent's Exhibit SS*

DECEMBER 30, 1930.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on December 30, 1930.

There were present: Mr. Mitchell, Mr. Baker, Mr. Rentschler, Mr. Perkins, Mr. Swenson, Mr. Winthrop, and Mr. Winston, also Mr. H. F. Mayer, Secretary.

Mr. Mitchell presided and Mr. Mayer acted as Secretary of the meeting.

The Minutes of the meeting held on December 23, 1930, were read and approved.

The Chairman read to the Board the following memorandum regarding the Management Fund and officers' salaries:

The standing resolution of the Board of Directors regarding the Management Fund for the year 1928, after determining how the Fund should be arrived at, provided that, at the close of the current year, or from time to time during the year, the Executive Committee shall be empowered to make distribution of the said Management Fund to operating executive officers of Presidential or Vice Presidential rank—half in accordance with fixed percentages and the other half in such proportion as might seem wise and proper by the Executive Committee; it being further provided that this resolution should not be construed as a contract, or creating vested rights, and that all determinations of any character whatsoever arising should be in the discretion of the Board. Inasmuch as the actual
774 amount to be distributed after the close of the year 1928 could not be determined until the books had actually been closed, which would be along in the middle of January, whereas by custom the payment was made about January 3rd, the distribution for the year 1928 was incomplete, and there has remained on the books $140,938.98 which has never been distributed.

Under similar Management Fund resolutions, there had been accrued for the year 1929 as of June 30, 1929, $2,739,719.99 as a direct result of operations of the first six months of that year, and the Directors saw fit to distribute as an advance to the officers in July on account of what then appeared a conservative estimate of the probable full year 1929 accruals a total of $1,860,000, leaving then in the Management Fund (a) for the year 1928 the sum of $140,938.98, as aforesaid, and (b) $879,719.99 from accruals of the first six months of operation of 1929.

At the end of the year 1929, by reason of losses incurred in operations of the second six months, a calculation of the Management Fund, on the basis of the full year's operation, showed no accruals whatsoever. It was therefore considered that for that year the officers had received in mid-year an advance payment on account of an expected credit in Management Fund which had failed to develop, and the officers individually in writing agreed to accept this

construction and accounts were debited on the books of the Company with the amounts advanced in mid-year, with the understanding, however, that such debits should be wiped out by and only by credits to which they might become entitled from Management Fund accruals in future. The actual wording of the paper signed by each officer with reference to this matter as lodged with the Treasurer of the Company reads as follows:

775 "Received on July 1, 1929, from The National City Company $, which represents an over-payment to me of my share for the year 1929 in the Management Fund, and which is to be repaid by me from future additions to the said Management Fund before I become entitled to any further payments therefrom."

There have been no accruals to Management Fund in the year 1930 and during this year, and in fact from July 1929, the only remuneration officers have received has been in the amount of their salaries. Especially by reason of the existence of the Management Fund resolution, the salaries of these officers have been established at a low figure; the highest being $25,000 per annum and the lowest $20,000 per annum. There are four cases where officers received salaries from both the Bank and the Company, but only in the case of Mr. Mitchell and Mr. Buckley do the aggregate of such salaries exceed $25,000. The officers' salaries were originally established with the idea that they would be sufficient for bare living expenses, but with the existence of the Management Fund most of the officers have established a style of living which calls for the expenditure of sums substantially in excess of these salaries, and in practically every case the officers have commitments over and above their living expenses which bring up the outgo to far in excess of salary payments. The result is a position of discomfort from which the officers now ask relief, through distribution to them of the amount remaining undistributed from Management Fund accumulations for the

776 year 1928, to which they feel they are morally entitled under the resolution of that year. Whereupon, after discussion,

On motion, duly made and seconded, Messrs. Mitchell, Baker and Rentschler not voting, it was

Resolved, That the undistributed part of the Management Fund for the year 1928, amounting to $140,938.98, shall be distributed not later than January 2, 1931, to such officers as were eligible for participation at the close of the year 1928 and are still in the employ of the company, and distribution thereof to individual officers shall be in the same proportion as the balance of such 1928 fund was distributed and the share of any officer not now eligible shall be also distributed in such proportion, as may be determined by a special committee consisting of Messrs. Swenson, Winthrop, and Winston.

Further resolved, That the payments made to eligible officers out of the Management Fund accruals in July 1929 shall continue to be considered as advances made from an expected accrual in Management Fund for the year 1929 which failed to materialize and that amounts so advanced will be continued as "debts owing" by the offi-

cers to whom such advances were made, payable only, however, from amounts so advanced will be continued as "debts owing" by the officials in Management Fund account, and

Further resolved, That the Chairman is authorized to advise the officers of the foregoing, and to give assurance that, as early as 777 may be found convenient in January 1931, this Board will adopt resolutions pertaining to the Management Fund for the year 1931, that in their judgment will be fair and of a reassuring character.

The Chairman stated that in view of the approaching completion of the City Bank Farmers Trust Company building, into which will be moved all departments of The National City Company now at No. 52 Wall Street, leaving that building with the institutional status of branch office premises for the branch of the Bank there established, the Executive Committee of the Bank, at its meeting today, had authorized the purchase of said building from this Company, for the sum of $7,250,000; and he submitted to the Board the question of selling the property at that price.

After discussion, on motion, it was

Resolved, that this Company sell and convey to The National City Bank of New York the premises known as No. 52 Wall Street, extending through to Pine Street, for the sum of $7,250,000, payable on delivery of a deed thereof, in form satisfactory to the Bank, subject to all existing tenancies; and that all rents, taxes, water charges, insurance premiums and other customary items, be apportioned as of the close of business on December 31, 1930; and that the President, or any Vice President, be and is hereby authorized to execute, and cause the corporate seal to be affixed to, a deed of the said premises.

On motion, the meeting then adjourned.

H. F. MAYER, *Secretary.*

778

RESPONDENT'S EXHIBIT T T

GOVTS. EXHIB. 1
APR 25 1939

January 2, 1931.

JAN 2 1931

MEMORANDUM TO MR. S. W. BALDWIN, TREASURER:

The following is an extract from the minutes of the meeting of the Board of Directors of The National City Company, held on December 30, 1930:

Resolved that the undistributed part of the Management Fund for the year 1928, amounting to $140,938.98, shall be distributed not later than January 2, 1931, to such officers as were eligible for participation at the close of the year 1928 and are still in the employ of the company, and distribution thereof to individual officers shall be in the same proportion as the balance of such 1928 fund was distributed and the share of any officer not now eligible shall be also distributed in such proportion, as may be determined by a special committee consisting of Messrs. Swenson, Winthrop and Winston.

H. F. Mayer
H. F. Mayer,
Secretary.

HFM:EB

In accordance with the above please draw following checks:

Copy.

Mr.	Mitchell	$50,515.53
"	Baker	16,670.41
"	Byrnes	15,154.46
"	Davis	6,061.78
"	Atwell	5,556.47
"	Russell	13,639.51
"	Rentschler	12,123.84
"	Brockley	6,061.78
"	Ripley	7,577.77
"	Schoepperle	4,546.82
"	Sylvester	3,030.89
		$140,938.98

BB1

779 *Respondent's Exhibit UU*

JANUARY 6, 1931.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on January 6, 1931.

There were present: Mr. Mitchell, Mr. Baker, Mr. Perkins, Mr. Winston, Mr. Winthrop, Mr. Stillman, Mr. Swenson, and Mr. Rentschler, also Mr. H. F. Mayer, Secretary.

Mr. Mitchell presided and Mr. Mayer acted as Secretary of the meeting.

Minutes of the meeting held on December 30, 1930, were read and approved.

Since Mr. Stillman was not present at the last meeting the Secretary reread to the Board the following memorandum regarding the Management Fund and officers' salaries:

The standing resolution of the Board of Directors regarding the Management Fund for the year 1928, after determining how the Fund should be arrived at, provided that, at the close of the current year or from time to time during the year, the Executive Committee shall be empowered to make distribution of the said Management Fund to operating executive offices of Presidential or Vice Presidential rank—half in accordance with fixed percentages and the other half in such proportion as might seem wise and proper by the Executive Committee; it being further provided that this resolution should not be construed as a contract, or creating vested rights, and that all determinations of any character whatsoever arising should be in the discretion of the Board. Inasmuch as the actual amount
780 to be distributed after the close of the year 1928 could not be determined until the books had actually been closed, which would be along in the middle of January, Whereas by custom the payment was made about January 3rd, the distribution for the year 1928 was incomplete, and there has remained on the books $140,938.98 which has never been distributed.

Under similar Management Fund resolutions, there had been accrued for the year 1929 as of June 30, 1929, $2,739,719.99 as a direct result of operations of the first six months of that year, and the Directors saw fit to distribute as an advance to the officers in July on account of what then appeared a conservative estimate of the probable full year 1929 accruals a total of $1,860,000, leaving then in the Management Fund (a) for the year 1928 the sum of $140,938.98, as aforesaid, and (b) $879,719.99 from accruals of the first six months of operation of 1929.

At the end of the year 1929, by reason of losses incurred in operations of the second six months, a calculation of the Management Fund, on the basis of the full year's operation, showed no accruals whatsoever. It was therefore considered that for that year the officers had received in mid-year an advance payment on account of an expected credit in Management Fund which had failed to develop, and the officers individually in writing agreed to accept this con-

struction and accounts were debited on the books of the Company with the amounts advanced in mid-year, with the understanding, however, that such debits should be wiped out by and only be credits to which they might become entitled from Management fund accruals in future. The actual wording of the paper signed by each
781 officer with reference to this matter as lodged with the Treasurer of the Company reads as follows:

"Received on July 1, 1929, from The National City Company $, which represents an over-payment to me of my share for the year 1929 in the Management Fund, and which is to be repaid by me from future additions to the said Management Fund before I become entitled to any further payments therefrom."

There have been no accruals to Management Fund in the year 1930 and during this year, and in fact from July 1929 the only remuneration officers have received has been in the amount of their salaries. Especially by reason of the existence of the Management Fund resolutions, the salaries of these officers have been established at a low figure; the highest being $25,000 per annum and the lowest $20,000 per annum. There are four cases where officers received salaries from both the Bank and the Company, but only in the case of Mr. Mitchell and Mr. Buckley do the aggregate of such salaries exceed $25,000. The officers' salaries were originally established with the idea that they would be sufficient for bare living expenses, but with the existence of the Management Fund most of the officers have established a style of living which calls for the expenditure of sums substantially in excess of these salaries, and in practically every case the officers have commitments over and above their living expenses which bring up the outgo to far in excess of salary payments. The result is a position of discomfort from which the officers now ask relief, through distribution to them of the amount remaining undistributed from Management Fund accumulations for
782 the year 1928, to which they feel they are morally entitled under the resolutions of that year.

Whereupon, after discussion,

On motion, duly made and seconded, the following resolutions were readopted by the affirmative vote of five members with no votes in the negative and Messrs. Mitchell, Baker, and Rentschler not voting.

Resolved, that the undistributed part of the Management Fund for the year 1928, amounting to $140,938.98 shall be distributed not later than January 2, 1931, to such officers as were eligible for participation at the close of the year 1928 and are still in the employ of the Company, and distribution thereof to individual officers shall be in the same proportion as the balance of such 1928 fund was distributed and the share of any officer not now eligible shall be also distributed in such proportion, as may be determined by a special committee consisting of Messrs. Swenson, Winthrop, and Winston.

Further resolved, that the payments made to eligible officers out of the Management Fund accruals in July 1929 shall continue to be

considered as advances made from an expected accrual in Management Fund for the year 1929 which failed to materialize and that amounts so advanced will be continued as "debts owing" by the officers to whom such advances were made, payable only, however, from amounts which may be distributed to such officers from future accruals in Management Fund account, and

Further resolved, that the Chairman is authorized to advise
783 the officers of the foregoing and to give assurance that, as early as may be found convenient in January 1931 this Board will adopt resolutions pertaining to the Management Fund for the year 1931, that in their judgment will be fair and of a reassuring character.

On behalf of the special committee appointed under the foregoing resolution, Mr. Winston reported that as Mr. G. K. Weeks was the only officer in the participation at the close of the year 1928, and not eligible because not now with the Company, it was recommended that his share be distributed to the remaining officers that were eligible in the participation for the year 1928 in the same proportions as they individually received during that year.

On motion, the meeting then adjourned.

——— ———, *Secretary.*

Respondent's Exhibit VV

JANUARY 9, 1931.

Special meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on January 9, 1931.

There were present: Mr. Mitchell, Mr. Baker, Mr. Swenson, Mr. Rentschler, Mr. Winthrop, Mr. Perkins, Mr. Stillman, and Mr. Winston, also Mr. H. F. Mayer, Secretary.

Mr. Mitchell presided and Mr. Mayer acted as Secretary of the meeting.

Minutes of the meeting held on January 6, 1931, were read and approved.

784 The Chairman presented to the Board the balance sheet of the Company as of December 31, 1930, showing (a) its current inventories written down to cost or market whichever the lower, (b) its inactive inventory written to market, (c) reserve aggregating $10,256,072.28 set up against accounts and notes receivable which, based upon the study of the individual items represented, in the opinion of Vice-President Mayer and the Comptroller of the Company, is sufficient to make the net figure a collectible amount and (d) the balance of the surplus being $5,694,429.93 combined with all reserves making an item of $16,432,191.43.

After discussion, on motion, duly made and seconded, it was

Resolved, that the balance sheet of the Company as of December 31, 1930, as submitted to this meeting be and it hereby is approved.

On motion, the meeting then adjourned.

H. F. MAYER, *Secretary.*

785 *Respondent's Exhibit WW*

The National City Company—Condensed Consolidated Balance Sheet as at Close of Business Dec. 31, 1939

ACCOUNTS	
Assets:	
Bonds and Stocks	$77,423,472.03
Acceptances	3,114,152.42
Securities Borrowed	5,000,000.00
Cash on Hand and in Banks	1,234,884.20
Due from Banks and Delivery Agents	1,898,737.09
Accounts Receivable	5,520,277.70
Loans and Bills Receivable	11,201,262.01
Accrued Syndicate Profits	398,130.00
Accrued Interest and Dividends Receivable	152,714.74
Other Assets	659,713.03
Total assets	106,603,343.22
Liabilities:	
Capital Stock	55,000,000.00
Surplus and Reserves	16,432,191.43
Loans and Bills Payable	22,034,732.37
Securities Borrowed (Contra)	5,000,000.00
Accounts Payable	7,418,898.63
Accrued Taxes	223,763.15
Accrued Interest Payable	22,871.64
Other Liabilities	470,886.00
Total liabilities	106,603,343.22

786 ANALYSIS OF SURPLUS AND RESERVES

Pension & Benefit Fund		$259,947.32
Other Deductions		221,741.90
General—for—		
Notes Receivable	$3,755,640.97	
Delinquent items	4,496,512.00	
Accounts Receivable	1,859,999.00	
Account 56 (Paris)	105,832.38	
Claims Receivable	38,087.93	
Sub-total	10,256,072.28	
Surplus	5,694,429.93	
		15,950,502.21
Total		16,432,191.43

Respondent's Exhibit XX

DECEMBER 28, 1931.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on December 28, 1931.

There were present: Mr. Mithell, Mr. Swenson, Mr. Rentschler, Mr. Baker, Mr. Rockefeller, Mr. Winthrop, Mr. Winston, and Mr. Carlisle; also Mr. Law, Secretary.

Mr. Mitchell presided and Mr. Law acted as Secretary of the meeting.

The minutes of the meeting held on December 21, 1931, were read and approved.

787 There was discussion of the special services performer by Mr. Ripley, Vice President of the Company, in connection with reorganizations in which The National City Company was interested. On motion, the following resolution was adopted:

Whereas, this Company now holds the receipt of Mr. J. P. Ripley reading as follows:

"Received on July 1, 1929, from The National City Company $150,000 which represents an overpayment to me of my share for the year 1929 in the Management Fund and which is to be repaid by me from future additions to the said Management Fund before I become entitled to any further payments therefrom.

"(Signed) J. P. RIPLEY."

and

Whereas, it is desirable to recognize the special services performed by J. P. Ripley during the current year in connection with the reorganization in which The National City Company was interested;

Now, therefore, be it resolved, that, in recognition of such special services and in addition to his regular compensation, this Company does release J. P. Ripley from any further obligation to repay to the Company, out of any future additions to the Manage-
788 ment Fund to which he might become entitled, the amount specified in the foregoing receipt, and do cancel and return said receipt to J. P. Ripley.

It was further

Resolved, that the Board of Directors of this Company do recommend to the stockholders of this Company that the capital stock of this Company be reduced through a change in the par value of the shares of capital stock of this Company from $100 per share to $20 per share, without change in the number of shares of stock outstanding.

On motion, the meeting then adjourned.

H. S. LAW, *Secretary.*

RESPONDENTS EXHIBIT Y Y

231 No 196377

JOURNAL TICKET Supplementary 39 of Dec. 31, 1931

ISSUED BY _____ APPROVED BY _____

CREDIT

[redacted]

ACCOUNTS RECEIVABLE AND PAYABLE MISCELLANEOUS
RESERVE FOR ACCOUNTS RECEIVABLE

SEC. ACCT. _____ SEC. ACCT. _____

ENTERED
Dec. 31 1931
JOURNAL DIVISION

U.S. Dist Court
S.D. of N.Y.
Ex. 130

To set up Accounts Receivable reserve.

	PRINCIPAL	RATE PER	AMOUNT	TOTAL	AVERAGE COST	COST	INDICATE AS PROFIT OR LOSS
				$1,709,999.00			S.I.

791 *Respondent's Exhibit ZZ*

OCTOBER 10, 1932.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on October 10, 1932.

There were present: Mr. Mitchell, Mr. Rentschler, Mr. Baker, Mr. Winthrop, Mr. Winston, and Mr. Carlisle; also Mr. Law, Secretary.

Mr. Mitchell presided and Mr. Law acted as Secretary of the meeting.

The minutes of the meeting held on October 3, 1932, were read and approved.

The Chairman presented the following resolution:

Whereas, Lee E. Olwell, formerly Vice President of this Company, has resigned and he is indebted to this Company for loans and advances made to him to the extent of $393,111.65, plus interest from July 1, 1932, which indebtedness is now carried on the books of the Company at $212,500 and is secured by certain collateral of a present market value of about $75,000; and

Whereas, it is believed that if this indebtedness be reduced to $200,000 and interest is fixed at 3% Mr. Olwell in his new employment will be able to meet the interest payments and ultimately to pay the $200,000 principal of his indebtedness to this Company;

Now, therefore, be it resolved, that this Company reduce the value on its books of Mr. Olwell's indebtedness to $200,000, cancel all
792 of said indebtedness in excess of said sum and receive from Mr. Olwell his note for $200,000 payable on or before two years from October 1, 1932, with interest at 3% per annum payable quarterly and secured by the same collateral as is now held as security for his existing indebtedness.

The following commitment was taken during the past week:

$3,000,000—Nassau County, N. Y. 3¾% and 4¾% Bonds, maturing 1935 to 1937 and 1948 to 1960, respectively. A joint account, managed by Chase Harris Forbes Corporation, was formed to procure purchasers at prices yielding 3.25% to 3.95%, according to maturity. Our participation was 675,000.

On motion, duly made and seconded, it was

Resolved, that the action of the Company's officers in accepting the foregoing commitment be and it hereby is approved.

On motion, the meeting then adjourned.

H. S. LAW, *Secretary.*

793 *Respondent's Exhibit AAA*

DECEMBER 27, 1932.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on December 27, 1932.

There were present: Mr. Mitchell, Mr. Swenson, Mr. Rentschler, Mr. Baker, Mr. Winthrop, and Mr. Winston. Also Mr. Law, Secretary.

Mr. Mitchell presided and Mr. Law acted as Secretary of the meeting.

The minutes of the meeting held on December 19, 1932, were read and approved.

On motion, it was

Resolved, that the reserve of $1,709,999 now standing against an equal amount of Accounts Receivable on the books of the Company, representing obligations to the Company from participants in the Management Fund in 1929, be applied against such Accounts Receivable and that the obligations of participants in the Management Fund in 1929 be carried on the books of the Company at $1.00, without, however, in any respect releasing these participants from their obligations to the Company.

Mr. Winston presented at the meeting, at length, the situation created on account of the sale in Massachusetts by The National City Company of Boston of certain stock of the Oliver Farm Equipment Company which had not been qualified under the Blue Sky Law of that State.

Mr. Winston also submitted to the meeting a summary of the
794 opinions of Ropes, Gray, Boyden & Perkins, the Company's counsel in Boston, as to the liability of The National City Company of Boston and as to the claim of liability of The National City Company (the New York corporation) on account of the sales of this Oliver stock. He further stated that the claim of the World Engineering Corporation on account of the purchase of $215,000 of stock of Oliver Farm Equipment Company and certain small claims on account of the purchase of same stock represented by the same attorney could, in his opinion, be settled for $100,000 and that another claimant interested in $44,000 of Oliver Farm Equipment Company stock and $15,000 purchase price of stock of The National City Bank could, in Mr. Winston's opinion, be settled with for $25,000. It was the opinion of Boston counsel, in which Mr. Winston concurred, that it was advisable that The National City Company of Boston settle these two claims within the figures mentioned and that in the second case settlement was justified on the basis of the Oliver stock, irrespective of the National City Bank stock.

Mr. Winston further stated that the Massachusetts Supreme Court had recently decided that in the case of securities not qualified under the Blue Sky Law of Massachusetts the purchaser could rescind and recover any loss he sustained, that a petition for a writ of certiorari to the Supreme Court of the United States to review the decision of the Massachusetts Supreme Court was in process of preparation but that Boston counsel, with whom Mr. Winston concurred, believed
that the chances of the Supreme Court's granting a writ of
795 certiorari and accepting jurisdiction of the case, or, in the event of granting the writ, of deciding that the Massachusetts Blue

Sky Law was unconstitutional, were not good and that the settlement could be made now at a lower figure than after an adverse decision on the writ of certiorari by the United States Supreme Court.

Thereupon, on motion, it was

Resolved, that it is the opinion of this Board that The National City Company of Boston would be justified in making settlement of the above mentioned claims within the figures suggested; and

Further resolved that this Company do loan to The National City Company of Boston the sum of $32,000 which, together with the existing resources of The National City Company of Boston, will put that corporation in funds to make the settlements.

On motion, the meeting then adjourned.

H. S. LAW, *Secretary.*

JOURNAL TICKET

No. 11785

ISSUED BY [illegible] APPROVED BY [illegible] DATE 12/30/32

DEBIT

ACCOUNTS RECEIVABLE & PAYABLE
MISCELLANEOUS
RESERVE FOR ACCOUNTS RECEIVABLE

SEC. ACCT. 248

CREDIT

ACCOUNTS RECEIVABLE & PAYABLE
MISCELLANEOUS
TREASURERS ACCOUNT SPECIAL

SEC. ACCT.

To transfer the Reserve for Accounts Receivable to the Treasurers Account Special. As per memo from H. S. Law attached to the debit side of this ticket.

ENTERED
DEC 30 1932
JOURNAL

NO	PRINCIPAL	DAYS INT.	INTEREST	TOTAL	AVERAGE COST	COST	INDICATE AS PROFIT OR LOSS
1				$1,709,999.00			1

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COPY

CC - Mr. H. F. Mayer, Vice President.

December 27, 1932.

Signed copy in Mr. Mayer's file 12/30/32

CONFIDENTIAL.

MEMORANDUM TO: Mr. Garrard Winston,
Shearman & Sterling.

In accordance with your advice this morning, I am requesting Mr. Mayer to apply the specific reserve of $1,709,999. against the asset of $1,710,000., representing the 1929 Other Deduction payments. This will be done at the close of the year.

Charge $1.00 balance to Reserve for doubtful accounts 12/30/32

H. S. Law,
Secretary.

HSL:JB

RESPONDENT'S EXHIBIT C C C

JOURNAL TICKET

No. 11786

ISSUED BY [signature] APPROVED BY [signature] DATE 12/30/32

EXHIBIT

ACCOUNTS RECEIVABLE & PAYABLE SPECIAL RVE FOR DOUBTFUL ACCOUNTS 276 SEC. ACCT.	~~ACCOUNTS RECEIVABLE & PAYABLE~~ ~~MISCELLANEOUS~~ TREASURERS ACCOUNT SPECIAL SEC. ACCT.

To charge the Reserve for Doubtful Accounts with $1.00 to close the Treasurers Account Special.
(See Journal #11785 Dec. 30, 1932)

ENTERED
DEC 30 1932
JOURNAL DIVISION

PAR	PRINCIPAL	DAYS INT.	INTEREST	TOTAL	AVERAGE COST	DEBIT	INDICATE AS PROFIT OR LOSS
CCC				$1.00			

799

RESPONDENT'S EXHIBIT D D D

S. W. Baldwin, Treasurer / Special Ac

Accounts Receivable Management Fund 1929

INVESTIGATION RECORD No. 4

Date	Name	Dr.	Cr	Balance	Remarks
July 1 1929	C E Mitchell	666667			
	H. B. Baker	220000 00			
	G S Rentschler	100 000 00			
	G S. Bradley	33333 33			
	R. M. Byrnes	170000 00			
	J. T. Davis	80 000 00			
	L. E. Elwell	70 000 00			
	Jos. S. Ripley	150 000 00			
	S S. Rossiter	170 000 00			
	H. R. Morrison	50 000 00			
	G. H. Reese	110 000 00		1,860,000 00	
Dec 28 1929	Resolution by Board of Directors for special services of Jos P. Ripley Loan Released from the obligation and the pledged returned. Canc		150 000 00	1,710,000 00	
Dec 27. 1929	Resolution by Board of Directors to establish these accounts at no dollar amount without releasing in any way the principle of the obligations to the Company. Amount written off		1,709,999 00	1.00	

RESPONDENT'S EXHIBIT E E E

June 22, 1931.

A meeting of the Board of Directors of The National City Company was held at No. 55 Wall Street, New York City, on June 22, 1931.

There were present: Mr. Mitchell, Mr. Swenson, Mr. Rentschler, Mr. Baker, Mr. Rockefeller, Mr. Winthrop, Mr. Winston and Mr. Carlisle; also Mr. Law, Secretary.

Mr. Mitchell presided and Mr. Law acted as Secretary.

The minutes of the meeting held on June 15, 1931 were read and approved.

Mr. Mitchell and Mr. Baker having withdrawn from the meeting, the committee appointed to consider salaries of officers of the Company made the following report to the Board:

> In a resolution of the Board of Directors of the Company at a meeting held January 6, 1931, provision was made for payment of the undistributed part of the management fund for the year 1928. The resolution further recited that as early as may be found convenient after January, 1931, the Board will adopt resolutions pertaining to the management fund for the year 1931 which in their judgment will be fair and of a reassuring character. No further action has been taken by the Board until the appointment of this Sub-committee for a consideration of the subject.
>
> It is our view that the Company should pay compensation to the Officers of this Company in line with the compensation currently paid by other like institutions. It is obvious that the management fund is not now, and may not for some time to come, be available to supplement the small fixed salaries now being received by our officers so as to bring their total compensation from the Company to a point reasonably fair to them and comparable with what they would receive in similar positions in other companies.
>
> We, therefore, recommend that:
>
> (1) For the calender year 1931 the salaries of

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officers of this Company be fixed in accordance with the schedule hereto attached, effective as of January 1, 1931, except as noted, and

(2) The Board give further consideration to the entire subject at the close of the present year.

(Signed) Beekman Winthrop
(Signed) E. P. Swenson
(Signed) Garrard Winston

Sub-committee

The following resolution was then adopted by the affirmative vote of all of the Directors present:

RESOLVED, that the report of the committee be approved and the salaries of the Officers of this Company recommended in the schedule accompanying the report and filed with the Treasurer be hereby fixed as the salaries of the Officers for the year 1931 effective as of January 1, 1931, except as otherwise in the schedule noted.

On motion, the meeting then adjourned.

Secretary.

EEE

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RESPONDENT'S EXHIBIT F F F

Name	Present Salary	Recommended Salary for 1932
Mitchell	$25,000	75,000
Baker	25,000	60,000
Buckley	15,000	20,000
Davis	25,000	50,000
Mayer	20,000	25,000
Morrice	20,000	25,000
Olwell	15,000	25,000
Ripley	25,000	50,000
Russell	25,000	50,000
Schoepperle	20,000	40,000
Sylvester	25,000	50,000
Jolles	17,500	30,000 Calendar Year dated March 8, 1931
Mann	17,000 (plus $3,600 house allowance)	$ 20,000
Morier	13,000 (approx. $14,560)	$ 4000

dated from June 8, 1931

No change recommended in any other salaries.

Edward Wiswell
Chairman Wiswell

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A. R. Winston & Co.

LOAN LEDGER.

EXHIBIT

Charles E. Mitchell

Exhibit S. T&D. Form

	DATE OF LOAN	NUMBER	CHARACTER OF LOAN	DUE	AMOUNT	RATE	DATE	AMOUNT	REMARKS
	1929						1929		
	Mch 27 1929	394	Collateral	Demand	1,000,000	4 3/4	Dec 8 1929	50,000	
	Feb 15 1929	936	"	"	3,000,000 1,500,000	4½	Jan 7 1930	1,000,000 1,000,000	
	Oct 30	1290	"	"	3,634,794	6	July 1	150,000	
	31	1354	"	"	4,784,794.50 1,149,794.50	5% from 4½	Aug 19	50,000	
	1931 Dec 21	1854	"	"	336,205	5	Jan 1930 6	1,000,000	
	22	"	"	"	33 60.02	"	Mar 4	216,200	
Not in 1929	24	"	"	"	5,157.63	"	7	1,325,000 1,000,000	
	28	"	"	"	28,280.50 1,000,000	5% from 3½ 4½ 5½	Dec 26 1931	1,129,330 1,129,330	
							Dec 17	377,459.50	
							18	13,399.27	
							21	719.50	
							30 1932	14,915.77	
							Jan 3	56,000.00	5.5% 53.31

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RESPONDENT'S EXHIBIT Y Y Y

CITY OF NEW YORK
DEPARTMENT OF
TAXES AND ASSESSMENTS
BOROUGH OF MANHATTAN
MUNICIPAL BUILDING
TELEPHONE, WORTH 2-1000

STATE OF NEW YORK :
: SS:
CITY & COUNTY OF NEW YORK :

George W. Adee, being duly sworn, deposes and says that he is a Deputy Tax Commissioner in Charge of Personal Assessments in the Department of Taxes and Assessments, City of New York; that the attached photostat is a true copy of the original statement of Mrs. Elizabeth R. Mitchell by C. E. Mitchell, Attorney-in-fact for the year 1928 and said original statement is on file in this office.

Sworn to before me this
27th day of April, 1934.

Jesse Cohen

NOTARY PUBLIC
Kings County 201
Kings County Register 2066
N. Y. County 27
N. Y. County Register 5C17
My Commission Expires Mar. 30, 1935

George W. Adee

U. S. BOARD OF TAX APPEALS
FILED
YYY

305

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ASSESSMENT OF PERSONAL PROPERTY

Hours for Correction of Assessment:
10 A. M. TO 2 P. M., EXCEPT SATURDAY, THEN 10 A. M. TO 12 M.

1928

PLEASE BRING THIS NOTICE WITH YOU

Line 18052

Mrs Elizabeth R Mitchell
93rd-5 Ave.

Page 1003

DO NOT IGNORE THIS NOTICE

Failure to appear at this office in person and apply for a reduction, if this assessment is excessive, will cause you to be taxed upon the amount stated below. If the tax be not paid, a judgment good for twenty years will be obtained against you.

DO NOT WRITE ON THIS NOTICE

IN BOARD
NOV 10 1927
APPROVED

DEPARTMENT OF TAXES AND ASSESSMENTS

COMMISSIONERS

HENRY H. GOLDSMITH, President

RICHARD H. WILLIAMS, GERARD HENRY PAYNE, SAM. H. OLLER, THOMAS HENRY, LEWIS H. PIERSON, ALFRED J. BOYLAN

XX
Hand
5000
11/10/27

BOROUGH OF MANHATTAN
Municipal Building, Ninth Floor, Chambers and Centre Streets

City of New York, October 1, 1927.

You are hereby notified that your assessment for PERSONAL ESTATE assessable in The City of New York, for the year 1928 is $ 50000

The Department is not required by law to send this notice. It is sent, however, for the information and benefit of the assessed.

Please bring a statement of the assets and liabilities, as they were on October 1, 1927. Your examination will be facilitated thereby.

By order of the BOARD OF TAXES AND ASSESSMENTS,
ISIDOR GREENBAUM, Secretary.

NOTE:

The Tax Law does not recognize partnerships. Each partner is liable upon his undivided share of taxable assets of the firm, after deducting his share of its just debts.

All tangible property, whether located in this State or elsewhere, must be scheduled.

(Penal Law—Section 2221. A person, who, in making any statement, oral or written, which is required or authorized by law to be made, as the basis of imposing any tax or assessment, or of an application to reduce any tax or assessment, willfully makes, as to any material matter, any statement which he knows to be false, is guilty of a misdemeanor.)

THIS ASSESSMENT, IF ERRONEOUS, CAN BE CORRECTED ONLY ON PERSONAL APPLICATION TO THE COMMISSIONERS AT THE TAX OFFICE IN YOUR BOROUGH, MADE ON OR BEFORE NOVEMBER 30, 1927.

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I declare on oath that the following is a complete statement of all tangible personal property which, on October 1, 1927, I owned, possessed or in which I had any interest.

ASSETS

1.	Goods, wares and merchandise, domestic and imported	$ None
2.	Machinery, plant and fixtures, not a part of real estate	None
3.	Household furniture, rugs, draperies, silverware and tableware	$
4.	Library	$ 0
5.	Jewelry, furs, clothing and all personal effects other than above	$ 5000
6.	Pictures, paintings, statuary, works of art	$ 0
7.	Tangible effects in safe deposit or in storage	$ 0
8.	Yachts and vessels not engaged in foreign trade, motor-boats, canoes	$ 0
9.	Horses and other animals, carriages, wagons	$ 0
10.	All other tangible personal property	$
		$
		$
	Total	$ 5000

Is any property of the class or character above mentioned insured in your name? No

If so, what kind of insurance is there on it? Fire, theft or other kind of loss?

What amount of insurance and in what companies?

Name of wife (or husband) Elizabeth P. Mitchell

DEDUCTIONS CLAIMED

1 Debts actually incurred and justly due by me.

(a) Notes of which I am maker given by me in the purchase of any of the above stated assets bound in New York State (state when given and the purpose)

$ 0

(a) Open accounts actually due by me on account of and for the purchase of merchandise included in above assets

$

$ 0

Brief Mfgr None

$

$

$

Total $ 0

RECAPITULATION

Total of Tangible Property owned by me	$ 5000
Total of Deductions	$ 0
Balance	$ 5000

My residence is at No. 930 5th Ave Borough of

City of New York.

My business address is None Borough of

City of New York.

The nature of my business is None.

STATE OF NEW YORK
COUNTY OF New York } ss.: Elizabeth P. Mitchell

I solemnly swear that I am , the person to whom the within notice is addressed. The foregoing statements headed "ASSETS" is a true and complete statement of all my taxable personal property which I owned or possessed or in which I had any financial or pecuniary interest on the first day of October, 1927. I did not then own any other taxable or assessable personal property nor had I any interest therein other than that set forth in the above statement of assets. I further swear that the facts set forth in the statement headed "DEDUCTIONS CLAIMED" are true and correct; that in the amounts stated as debts there is not included any indebtedness contracted or incurred for the purpose of evading taxation, nor any indirect or contingent liability as surety, guarantor, indorser or otherwise, nor any indebtedness owing by any partnership in excess of what is my proportionate share as a member of such partnership. I do further say that the answers I make to all questions put to me on this examination touching my personal property are true.

Subscribed and sworn to before me this 1st day of Oct, 1927.

Marianne Keegan
Notary Public

Elizabeth P. Mitchell
Signature of applicant.
by Charles E. Mitchell
Atty in fact

807 *Respondent's Exhibit ZZZ*

[Letterhead of]

CITY BANK FARMERS TRUST COMPANY,
22 WILLIAM STREET,
New York, July 1, 1931.

In reply please quote Cust.

Attention Mr. Sweeney

CHARLES E. MITCHELL, ESQ.,
55 Wall Street, New York, N. Y.

DEAR MR. MITCHELL: In compliance with your request we enclose a check drawn to your order for $49,033.84, and have debited a like amount to Mrs. Mitchell's Investment Management Principal Account.

Very truly yours,

(Signed) W. Monsees,
W. MONSEES,
Asst. Trust Officer.

WM/MVS.
Enclosure (1).

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RESPONDENT'S EXHIBIT A A A A

Ex. 35
T.E.D.

READJUSTMENT
of
INTERBOROUGH RAPID TRANSIT COMPANY
Underwriting Syndicate

G.M-P. MURPHY & CO.
KIDDER, PEABODY & CO.
J. & W. SELIGMAN & CO.
GUARANTY COMPANY OF NEW YORK
Syndicate Managers

New York, April 14, 1923.

Mr. Charles E. Mitchell,
55 Wall Street,
New York City.

Dear Sir:

On behalf of the Syndicate Managers, we enclose check in your favor for $4,000, being 4% underwriting commission on your participation in the above Syndicate.

The Syndicate will continue in existence pending the liquidation of certain remaining assets and the final distribution by the Trustee in Bankruptcy of the assets of the Interborough Consolidated Corporation. It is hoped that this final distribution by the Trustee in Bankruptcy will be made by July 1st next and that the final distribution of the Syndicate profits can be made immediately thereafter.

Very truly yours,

For the Syndicate Managers,
G. M.-P. Murphy & Company,

By Raymond Rogers

DRM-CTT
Enclosure.

809

RESPONDENT'S EXHIBIT B B B B

Ex 46
T.D.
46

William and Pine Streets
New York

Kuhn, Loeb & Co

Aug. 7, 1928

CONFIDENTIAL

Charles E. Mitchell, Esq.,
55 Wall St.,
New York, N. Y.

Dear Sir:

Referring to our letter of June 17th, we beg to enclose check for $3,189.37 , representing your share of the commission and profit realized in the underwriting of Famous Players-Lasky Corporation Common Stock, receipt of which please acknowledge in final settlement of your interest in this transaction.

Yours very truly,
Kuhn, Loeb & Co.
By Elgin L. Stapp

U. S. BOARD OF TAX APPEALS
DIV. ..... DOCKET NO. 80
MAY 2 1934
PETITIONER'S EXHIBIT
RESPONDENT'S

LES:AG
Enclosure (check)

810

RESPONDENT'S EXHIBIT C C C C

E. H. Hewitt. NO.

April 1, 1932.
No. 15020.

DEBIT Unclaimed Interest & Dividends
THE NATIONAL CITY BANK OF NEW YORK STOCK
APRIL 1, 1932 DIVIDEND.

CHECK TO:
Mr. C. E. Mitchell,
55 Wall Street,
New York, N. Y.

TICKET NO.
18,200 SHARES
Per instructions from Mr. S. W. Baldwin.

Enclosed herewith please find check for the dividend on the above mentioned stock as referred to in our letter of above date.

$13,725.00

Very truly yours,

THE NATIONAL CITY COMPANY

By:

Previous dividends on 18,300 shares paid to the order of E. Rand Mitchell. Name of payee changed in accordance with instructions from S.W.Baldwin.

Paid April 1, 1932.
CPM&P

811 *Respondent's Exhibit DDDD*

Draft of minutes for December 30

The Chairman presented to the Board estimates of the operations for the year 1929 and discussed with the Board in detail the principal items in the security inventory. After a thorough discussion, the following resolutions were duly adopted:

Resolved that this Company carry on its books as of December 31, 1929, its current or trading inventory at the lower of cost or market as of said date. Be it further

Resolved that in view of the character of the inventory carried in No. 55 Account which represents long time investments or investments for purposes other than trading, the inventory continue to be carried on the books of the Company at the figures for such inventory now on the books.

The Chairman then discussed the status of the Management Fund with particular reference to the distribution made of this fund at the close of the first six months of the current year, and the status of the fund after the results of the whole year were taken into account. After discussion the following resolution was duly adopted:

Resolved that the share which each of the executives of this Company received in the distribution of the first half of the Management Fund for 1929 be debited against each of such officers respectively on the books of this Company to be repaid by each of them out of any distributive share of the Management Fund which each of such officers may be entitled to receive in any year subsequent to the current year 1929.

812 (Here follows the matter dictated by Mr. Cary in connection with the stock purchase plan.)

Minutes of meeting of January 9

The Chairman discussed the Management Fund for the year 1930. After discussion the following resolution was duly adopted:

Resolved that commencing as of January 1, 1930, for the purpose of determining the Management Fund for distribution to the executive officers of the Company, all securities including those in syndicate accounts be taken at the lower of cost or market and all securities in the No. 55 Account be taken at market. Further

Resolved that the basis of division as between the executive officers with reference to the first half of the fund during 1929 be continued during 1930 as to those officers receiving advances from management funds in July 1929, and until rescinded and revised by this Board. Further

Resolved that after the distribution made among the executive officers in July 1929 has been repaid to the Company out of the Management Fund accumulated and distributed subsequent to December 31, 1929, the Board again consider the Management Fund

in all its phases and reestablish the basis for future distributions as at such time seems just and equitable.

The Chairman then discussed the form of his proposed report to the shareholders of the National City Bank of New York in so far as such report had reference to the affairs of the Company and the form thereof was informally approved.

813 *Respondent's Exhibit EEEE*

C. E. MITCHELL,
55 WALL STREET,
New York, December 15, 1931.

DEAR GEORGE: I will have to take some tax losses this year and possibly in large amount, and I want to prepare myself therefor and am going to act in accordance with the attached memorandum from our tax expert. In other words, my first step will be to sell all of the securities other than City Bank stock out of the collateral in my loan with you, and having sold it buy it back forthwith, leaving to a further determination, in the last days of the month, how much I will need to permanently sell to put my affairs in proper shape. I enclose letters addressed to your firm authorizing this first step. Will you be good enough to see that the machinery is started.

Sincerely,

CHARLES.

Mr. GEORGE WHITNEY,
Care of J. P. MORGAN & COMPANY,
23 Wall Street, New York, New York.

STAMP.

Know all Men by these Presents, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by J. P. Morgan & Co., of the City of New York, hereby agree with the said firm that whenever the undersigned shall become or remain, directly or indirectly, indebted to the said firm for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee or in any other manner whatsoever, or upon any other claim, the said firm shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the undersigned, or his or their executors, administrators or assigns, namely:

1. All securities deposited by the undersigned with said firm, as collateral to any such loan or indebtedness of the undersigned to said firm, shall also be held by said firm as security for any other liability of the undersigned to said firm, whether then existing or thereafter contracted; and said firm shall also have a lien upon any balance of the deposit account of the undersigned with said firm existing from time to time, and upon all property of the undersigned of every description left with said firm for safe keeping or otherwise, or coming to the hands of said firm in any way, as security for any liability of the undersigned to said firm now existing or hereafter contracted.

2. Said firm shall at all times have the right to require from the undersigned that there shall be lodged with said firm as security for all existing liabilities of the undersigned to said firm approved collateral securities to an amount satisfactory to said firm; and upon the failure of the undersigned at all times to keep a margin of securities with said firm for such liabilities of the undersigned, satisfactory to said firm, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said firm shall at the option of said firm become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3. Upon failure of the undersigned either to pay any indebtedness to said firm, when becoming or made due, or to keep up the margin of collateral securities above provided for, then, and in either event, said firm may immediately, without advertisement and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Brokers' Board or otherwise, and apply the proceeds of such sale, as far as needed, toward the payment of any or all of such liabilities, together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Brokers' Board or at public auction said firm may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid said firm may also apply, toward the payment of the said liabilities, all balances of any deposit account of the undersigned with said firm then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future, as well as to existing, transactions between the undersigned and said firm.

Dated New York, the 2nd day of March, 1913.

FFFF

814 GUY T. HELVERING VS. CHARLES E. MITCHELL 439

RESPONDENTS EXHIBIT. F F F F

815

RESPONDENT'S EXHIBIT GGGG
FOR IDENTIFICATION.

C. E. MITCHELL
J. P. MORGAN & CO

December 15, 1931

2 P M
47063

J.P. Morgan and Company
23 Wall Street
New York City

Gentlemen,

Please sell for my account the following securities which are lodged as collateral in my loan with you:

	1,500	shares	Anaconda Copper Mining Company
	5,000	par	Allegheny Corporation
	1,500	"	American and Foreign Power "A"
	4,000	"	American and Foreign Power Warrants
	1,800	"	American I.G. Chemical,
	300	"	Continental Illinois Bank and Trust Company
	$86,000	par	International Telephone and Telegraph Cory.
	2,500	"	United Aircraft & Trans. Cory. (Common)
	2,000	"	United Aircraft & Trans. Cory. (preferred)
	2,200	"	United States Realty & Improvement Co.
	1,000	"	Wesson Oil and Snowdrift Co. Inc Com.
	2,000	"	F.W. Mallory Company Inc.
	300	"	Standard Brands Inc.
	2,000	"	Pennroad Corporation
	$50,000		Int. Telephone and Telegraph 4½ % debentures '39

Yours very truly,

Hurley Bro 37.00
Kearney Bro 1.00
Keogh & Co 6.00

817 *Respondent's Exhibit HHHH for Identification*

C. E. MITCHELL,
55 WALL STREET,
New York, December 17, 1931.

J. P. MORGAN AND COMPANY,
23 Wall Street, New York City.

GENTLEMEN: Please purchase for my account and risk, and oblige in my collateral loan with you, all securities sold and delivered for my account under instructions contained in my letter of December 15th.

Yours very truly,

C. E. MITCHELL.

Respondent's Exhibit IIII for Identification

J. P. MORGAN & Co.,
December 17, 1931.

Private and Confidential

C. E. MITCHELL, Esq.,
55 Wall Street, New York, N. Y.

DEAR SIR: We charge your account today $377,459.50, and
818 as instructed have applied same on account of the principal of your demand loan dated October 30, 1929.

We have released from the securities we hold as collateral due to the above loan:

1,500 shs. Anaconda Copper Mining Company.
3,000 " Alleghany Corporation.
1,500 " American and Foreign Power Corp., 2nd Preferred.
4,000 " American and Foreign Power Corp., Optional Warrants.
200 shs. Continental Illinois Bank & Trust Co. Stock.
4,000 " International Telephone & Telegraph Corp.
5,500 " United Aircraft and Transport Corp. Common Stock.
2,000 " United Aircraft and Transport Corp. Preferred.
2,500 " United States Realty & Improvement Co. Common.
1,000 " Wesson Oil & Snowdrift Co. Preferred Stock.
1,500 " American I. G. Chemical Corp. Common Stock.
2,000 " P. R. Mallory & Co., Inc., Common Stock.
500 " Standard Brands Incorporated Common Stock.
3,000 " Pennroad Corporation.

Yours very truly,
LOAN: HW: VC.
HW.

819 In United States Circuit Court of Appeals for the Second Circuit

No. 134. October Term, 1936

Argued Jan. 19, 1937. Decided May 10, 1937

CHARLES E. MITCHELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the Board of Tax Appeals

Before SWAN, AUGUSTUS N. HAND, and CHASE, Circuit Judges

From an order of the Board of Tax Appeals determining a deficiency of $728,709.84 and a penalty of $364,354.92 in income taxes of the petitioner, Charles E. Mitchell, for the year 1929, the latter appeals.

William Wallace and Chadbourne, Stanchfield & Levy, all of New York City (William Wallace, Leonard P. Moore, and David S. Hecht, all of New York City, of counsel), for petitioner.

Robert H. Jackson, Asst. Atty. Gen., and Edward S. Greenbaum, Sewall Key, and Lucius A. Buck, Sp. Assts. to the Atty. Gen., for respondent.

Opinion

AUGUSTUS N. HAND, Circuit Judge. This is a petition by Charles E. Mitchell, a taxpayer, to review a decision of the Board of Tax Appeals determining a deficiency of $728,709.84 and a 50 per cent. penalty of $364,354.92 in income taxes for the year 1929.

The questions raised by the petition to review relate to a loss taken by Mitchell and an income item omitted by him in his 1929 income tax return and are the following:

(1) Was an alleged sale by the taxpayer to his wife in 1929 of 18,300 shares of National City Bank at $212 per share a real sale that justified his deduction of a loss of $2,872,305.50 from his gross income in computing taxes?

(2) Was the payment of $666,666.67 by the National City Company which was made to the taxpayer in 1929 from the so-called management fund as compensation for services, but omitted from his return for that year, taxable income?

(3) Was the deduction of $2,872,305.50, or the omission of $666,666.67, due to a fraudulent attempt to evade taxes which justified the 50 per cent penalty imposed by the Commissioner?

(4) Was the finding of a tax deficiency by the Commissioner on account of the error in dealing with deduction and omission of the above items by the taxpayer precluded by his acquittal under the

indictment for fraudulent tax evasion which was based upon those very items?

(5) In any event, could the 50 per cent penalty properly be imposed where the taxpayer was acquitted under such indictment?

The Commissioner determined the tax deficiency of Mitchell for the year 1929 because of the omission of $666,666.67 from his return, and the inclusion therein of the alleged loss from the sale of 18,300 shares of National City Bank stock to Mrs. Mitchell. The Commissioner surcharged his return with the former item, disallowed the latter, and imposed the 50 per cent penalty under section 293 (b) of the Revenue Act of 1928, 26 U. S. C. A. § 293 (b) and note,
820 for "fraud with intent to evade tax." The tax deficiency based upon these items and the 50 per cent penalty which had been assessed by the Commissioner were affirmed by the Board of Tax Appeals. Four members of the Board agreed with the result, but held that the item of $666,666.67, though taxable income, was not shown to have been fraudulently omitted from the return. One member, McMahon, held that the evidence did not establish fraud as to that item or as to the loss taken for the sale to Mrs. Mitchell, and both members McMahon and Smith held that by the decision of the Supreme Court in Coffey v. United States, 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684, the acquittal of Mitchell under the indictment barred a finding of fraud and consequently the determination of the tax deficiency.

It must be borne in mind that our power to review the Board of Tax Appeals is confined to questions of law and that we are bound by its findings of fact in support of which there is any substantial evidence. McCaughn v. Real Estate Co., 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879; General Utilities Co. v. Helvering, 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 154; Hulburd v. Commissioner, 296 U. S. 300, 306, 56 S. Ct. 197, 200, 80 L. Ed. 242; Helvering v. Rankin, 295 U. S. 123, 131, 55 S. Ct. 732, 736, 79 L. Ed. 1343. We think there can be no doubt that there was substantial evidence before the Board that the item of $666,666.67 was income of the taxpayer, that the loss incurred through the alleged sale to Mrs. Mitchell was not a genuine loss, and that the omission of the first item and the deduction of the loss were fraudulent attempts to evade taxes.

There was ample evidence that the sale of 18,300 shares of stock to Mrs. Mitchell did not represent a genuine transaction. It was prompted by the realization by Mitchell during that year of an income from which some loss had to be deducted if the payment of a huge tax was to be avoided. Mrs. Mitchell's assets aside from chattels and the cash value of certain insurance policies on the life of her husband amounted to $940,994.12, of which only $32,027.80 was cash. Yet Mitchell purported to sell to her 18,300 shares of bank stock at $212 a share, aggregating a total obligation to him on her part of $3,879,600. His offer to sell was evidenced by a letter on December 20, 1929, in which he stated that the shares were at present carried

in a loan with J. P. Morgan & Co. for his account and that for her convenience he would arrange so to continue the carriage of the stock subject to her payment of the amount due, "the debt in any event to be liquidated by you within nine months from the date hereof." The same day she wrote confirming the purchase and authorizing him to sell the shares whenever it seemed proper at not less than $220 per share. No notification of the transaction was then given to J. P. Morgan & Co., nor was any arrangement made with them to withdraw the stock from the collateral loan at $212 per share, though Mitchell's counsel had advised him that such an arrangement ought to be made. The same day he notified Taff & Co., in whose name the certificates were registered, that dividends received from the stock subsequent to January 2, 1930, were to be paid to Mrs. Mitchell. No payments on account of the purchase price of the stock were ever made. Certain so-called "interest payments" were made by Mrs. Mitchell to the taxpayer out of her bank account. These interest payments were in excess of the dividends received from the stock by $258,267.69. In order to make them without depleting her personal estate, she received from her husband between December 20, 1929, and December 31, 1932, various large sums of money purporting to be birthday, wedding anniversary, and other gifts. The illusory nature of a purchase in a case where the seller furnishes the money to meet interest on the purchase price is manifest. The purchase of the stock by Mrs. Mitchell as an investment at a contract price of $3,879,600, payable within nine months and with no means to meet the obligation, is in itself highly improbable, if not fantastic. The transaction is much more explicable as an ostensible, even if fraudulent, means of registering a deductible loss than as a way of making an investment. In January 1932, at the annual stockholders' meeting of the National City Bank, Mitchell was asked by a stockholder whether he had disposed of any of his stock and replied: "Not a single share, sir. As a matter of fact I am buying all I can possibly get and that I can possibly pay for." Later, on March 5, 1932,

821 he forwarded to the National City Company a letter from his counsel advising that in their opinion that company was under obligation to take up from the Morgan loan "at their net present cost" the 18,300 shares of stock that he was carrying in order to relieve him from the loss he had already incurred in making a market for stock of the National City Bank. No suggestion was made in the letter that the 18,300 shares of stock had theretofore been sold to Mrs. Mitchell. The letter was presented to the board of directors of the company who conferred about Mitchell's claim and secured an opinion from John W. Davis, Esq., that it had no legal basis. On March 24, by another exchange of letters, Mrs. Mitchell purported to resell the 18,300 shares of stock to her husband at the original purchase price of $212 a share, although the then market price was $45 a share and Mitchell was insolvent to the amount of $3,000,000. Just as in the transaction of December 20, 1929, no cash passed between Mitchell and his wife. Under the letters exchanged on March 24, 1932, Mrs.

Mitchell was released from any further obligation in connection with the transaction. Thus we find an arrangement having no practical object other than to escape income taxes—an arrangement whereby a husband purports to sell stock to his wife without obtaining either note, security, or cash payment, and finally purports to buy it back at a time when he is seeking to have his company relieve him from the Morgan collateral loan. Under the circumstances, it may be reasonably supposed that he assumed to buy back the stock so as to have unquestionable title if the National City Company should prove willing to take up the shares. Both in case of the alleged sale and repurchase Mitchell made the initial offer to his wife and throughout the transactions treated the stock as essentially his own. It should also be noted that at the time of the alleged sale to Mrs. Mitchell on December 20, 1929, no internal revenue or state transfer stamps were attached to the contract of sale, no bill of sale was ever executed, nor were the certificates of stock ever out of the possession of J. P. Morgan & Co., by whom they were continuously held as collateral for Mitchell's indebtedness.

It is clear that there was substantial evidence in support of the finding by the Board of Tax Appeals that "the transaction was not a bona fide sale and the alleged loss did not constitute an allowable deduction from income" and that "the alleged sale was fraudulent with intent to evade tax." Record, p. 92.

There also was sufficient evidence to support the finding of the Board that the failure of the taxpayer to report the payment of $666,666.67 from the management fund in 1929 was fraudulent.

The management fund was created by resolution of the directors of the National City Company, an affiliate of the bank, on February 8, 1921, as a means for providing additional compensation for its officers. The fund was derived from a certain percentage of the net operating income which under resolutions adopted in 1927 was set up each month and was distributable by the executive committee at the end of the year, or from time to time during the year. Distributions were made semiannually from the time of the creation of the fund in 1921 until the distribution of $666,666.67 in question on July 1, 1929. There seems to be ample justification for holding that the payment of $666,666.67 on July 1, 1929, became an irrevocable appropriation of moneys at the time when it was made, although future payments were within the control of the executive committee. The company incurred such losses during the last three months of 1929 that there were no net earnings for the year as a whole. Under these circumstances, the question whether there was a right to retain the distributions of July 1 is said to have been investigated, and as a result receipts were prepared and signed by Mitchell and the other distributees, acknowledging that the distributions of July 1, 1929, were overpayments and agreeing that they were to be repaid from future additions to the management fund "before I become entitled to any further payments therefrom." On December 30 the board of trustees adopted a resolution

to that effect. Because of the contingent obligation created by the receipt, Mitchell contends that he was justified in omitting the item of $666,666.67 from his income tax return, and he fortifies his position by proof that counsel advised him that the item did not have to be returned. We can imagine no legal ground for saying that it was not taxable income. In respect to the claim of justification because of the advice of counsel, it is to be remembered
822 that it was Mitchell who suggested that the right to retain the $666,666.67 should be looked into, recommended that the distributions should only be treated as advances of future accumulations of the management fund and, on December 30, 1929, presented that plan to the directors who adopted it. We cannot see that he was ever obliged to repay the $666.666.67, nor is it shown that he ever attempted to repay it. In no event was it to be repaid except from shares in the management fund, if any, which he might be entitled to receive after 1929. Such a contingent obligation amounted to nothing. The disposal of the management fund was at all times wholly within the control of the executive committee who could appropriate or withhold distributions as they saw fit. Under such circumstances there is every reason to suppose that the purpose of Mitchell was to retain the $666.666.67 without returning it as income. His theory that his contingent obligation offset his receipt of income has such little plausibility that it is hard to believe that an able man of large experience like Mitchell could entertain an honest belief in it. In any event the finding of the Board that the transaction was fraudulent does not lack substantial support in the evidence.

It is argued for the petitioner that all of the acts involved in the present proceeding were determined against the government when he was acquitted in the criminal prosecution against him under section 146 (b) of the Revenue Act of 1928, 26 U. S. C. A. § 145 (b) and note of the charge in the indictment that he unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax. * * *"

Section 146 (b), Revenue Act of 1928, provides that: "Any person required under this title [chapter] to collect, account for, and pay over any tax imposed by this title, * * * who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

In United States v. Scharton, 285 U. S. 518, 52 S. Ct. 416, 417, 76 L. Ed. 917, where there was an indictment under a similar section of the revenue laws, the question was whether the three or the six year statute of limitations which then barred prosecutions should be applied. The three-year statute was general in terms and the six-year statute (18 U. S. C. A. § 585 (an exception limited to "offenses involving the defrauding or attempting to defraud the United

States or any agency thereof." On demurrer to the indictment in which the defendant was charged with a willful attempt to evade taxes by falsely understating taxable income, the Supreme Court held that the three-year, and not the six-year, statute applied. Roberts, J., who wrote the opinion, said that under the section governing the charge an averment of fraud "would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat." If Mitchell, when indicted under section 146 (b), had been convicted, his conviction would not have been res judicata as to fraud in the case at bar because proof of fraud would not have been necessary to establish the criminal offense denounced by the statute. United States v. Scharton, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917. But the acquittal of Mitchell under the indictment founded on section 146 (b) necessarily involved a finding that he was guilty of no fraud, since a fraudulent intent "to evade or defeat" a tax would necessarily involve the willful attempt to "evade or defeat" broadly covered by section 146 (b).

From the indictment and the charge of the court in the criminal prosecution it is clear that the government relied on the same facts as it relies on in the case at bar to establish fraud.[a]

828 The doctrine of res judicata is plainly inapplicable to the portion of the tax other than the 50 per cent so-called penalty. The acquittal in the criminal case only determined that Mitchell had not been proved guilty beyond a reasonable doubt of the criminal acts charged in the indictment. It plainly did not preclude the Commissioner from asserting a tax deficiency against him. Murphy v. United States, 272 U. S. 630, 632, 47 S. Ct. 218, 71 L. Ed. 446; Lewis v. Frick, 233 U. S. 291, 302, 34 S. Ct. 488, 58 L. Ed. 967; Chantangco v. Abaroa, 218 U. S. 476, 481, 31 S. Ct. 34, 54 L. Ed. 1116; Stone v. United States, 167 U. S. 178, 186–189, 17 S. Ct. 778, 782, 42 L. Ed. 127. In the last case, after an indictment and acquittal in the federal court upon a charge of unlawfully cutting and removing timber from public lands, Stone was sued by the United States for the value of the timber removed. In the suit the prior judgment of acquittal was pleaded in bar, Stone relying upon the decision of the Supreme Court in Coffey v. United States, 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684. The Supreme Court, in an opinion by Harlan, J., held that the decision in Coffey v. United States did not apply to a situation where there had been an acquittal upon a criminal charge followed by a civil action requiring a different degree of proof, and said:

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[a] Section 276 of the Revenue Act of 1928, 26 U. S. C. A. § 276 and note, provides that:
"In the case of a false or fraudulent return with intent to evade tax * * * the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."
Section 293, 26, U. S. C. A. § 293 and note, provides that:
"If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed."
In the case at bar fraud had to be established in order to avoid the two-year statute of limitations (26 U. S. C. A. § 275 note) which would otherwise apply.

"In the criminal case his acquittal may have been due to the fact that the government failed to show beyond a reasonable doubt the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict. * * * It cannot be said that any fact was conclusively established in the criminal case, except that the defendant was not guilty of the public offense with which he was charged. We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime either forfeited its right of property in the timber, or its right in this civil action, upon a preponderance of proof, to recover the value of such property." See, also, United States v. Donaldson-Shultz Co., 148 F. 581 (C. C. A. 4).

But the petitioner claims that under Coffey v. United States, 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684, his acquittal precludes the assessment of deficiency even of the normal tax without the 50 per cent penalty. Any inference to that effect that might originally have existed has, we think, been eliminated by the later Supreme Court decisions already cited. The only rule necessarily derivable from Coffey v. United States would seem to be that an acquittal in a criminal prosecution is a bar to a civil action to enforce fines or forfeitures of property which are in their nature criminal penalties. Though this rule seems hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility,[2] it is implicit in the decision of Coffey v. United States which is binding on us in the absence of a modification by the Supreme Court.

The question is whether the 50 per cent addition tax was designed to punish fraudulent tax dodgers or was a mere preventive measure. An order padlocking a building as a nuisance under the National Prohibition Act (27 U. S. C. A. § 1 et seq.) was held in Murphy v. United States, 272 U. S. 630, 47 S. Ct. 218, 71 L. Ed. 446, to have been made to enforce a statutory preventive measure, and not a penalty. But in United States v. La Franca, 282 U. S. 568, 51 S. Ct. 278, 280, 75 L. Ed. 551, it was said that the imposition of a tax "in double the amount" provided by law "upon evidence of an illegal sale" of liquor under the act was a penalty and could not be "converted into a tax by the simple expedient of calling it such." 824 Murphy v. United States was distinguished on the ground that the tax levied in United States v. La Franca in double the amount was a penalty.

We think that the decisions in Coffey v. United States, 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684, and United States v. La Franca, 282 U. S. 568, 51 S. Ct. 278, 75 L. Ed. 551, require us to treat the imposition of the penalty of 50 per cent as barred by the prior acquittal of Mitchell in the criminal action.

[2] The evidence necessary to establish "fraud with intent to evade tax" under section 293 (b) of the Revenue Act of 1928, 26 U. S. C. A. § 293 (b) and note, need only be clear and convincing but need not be proof beyond a reasonable doubt. Oriel v. Russell, 278 U. S. 358, 364, 49 S. Ct. 173, 174, 73 L. Ed. 419; United States v. Regan, 232 U. S. 37, 46–48, 34 S. Ct. 213, 58 L. Ed. 494.

The order of the Board of Tax Appeals is accordingly modified so as to eliminate the penalty of $364,354.92 for the year 1929 and in other respects is affirmed.

825 In the United States Circuit Court of Appeals, Second Circuit

Present: Hon. THOMAS W. SWAN, Hon. AUGUSTUS N. HAND, Hon. HARRIE B. CHASE, Circuit Judges.

CHARLES E. MITCHELL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgement

Filed May 17, 1937

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, _____, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the ____ order ____ of said United States Board of Tax Appeals be and it hereby is modified in accordance with the opinion of this court and in other respects is affirmed.

It is further ordered that a Mandate issued to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

826 [File endorsement omitted.]

827 [Clerk's certificate to foregoing transcript omitted in printing.]

828 Supreme Court of the United States

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

(Endorsment on cover:) File No. 41,788, 41,805. U. S. Cir Court of Appeals, Second Circuit. Term No. 324. Guy T. Hel ing, Commissioner of Internal Revenue, Petitioner, vs. Charle Mitchell. Petitions for writs of certiorari and exhibit thereto. F August 12, 1937, August 17, 1937. Term No. 307 O. T. 1937, O. T. 1937.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES E. MITCHELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above cause on May 17, 1937, reversing in part the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 156–210) is reported in 32 B. T. A. 1093. The opinion of the Circuit Court of Appeals (R. 819–828) is reported in 89 F. (2d) 873.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 17, 1937. (R. 828–829.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer was indicted under Section 146 (b) of the Revenue Act of 1928 for a willful attempt to evade and defeat taxation. Does his acquittal bar the Commissioner from asserting, under Section 293 (b) of the Revenue Act of 1928, a 50% addition to the tax deficiency by reason of "fraud with intent to evade tax"?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

In his income tax return for the year 1929 the respondent claimed, and deducted from gross income, an alleged loss of $2,872,305.50 from a purported sale of 18,300 shares of National City Bank stock to his wife. (R. 96–97.) The respondent also failed to return as income an item of $666,666.67, received by him on July 1, 1929, as a distribution from the management fund of the National City Company, of which he was chairman. (R. 96.)

On April 25, 1933, an indictment was returned against the respondent by a grand jury of the District Court of the United States for the Southern District of New York. The indictment contained two counts. Only the first count is here material. That count charged that the respondent "unlawfully, willfully, knowingly, feloniously and fraudulently did attempt to defeat and evade an income tax of, to-wit, $728,709.84 upon his net income for 1929." (R. 154–155.) Thereafter the respondent was tried upon the charges contained in the indictment before the court and a jury. The trial commenced on May 11, 1933, and terminated on June 22, 1933, when the jury returned a verdict of not guilty on all counts. (R. 156.)

On December 8, 1933, the Commissioner asserted a deficiency against the respondent (R. 29) for the year 1929 in the amount of $728,709.84, together with a 50% addition thereto by reason of fraud in the amount of $364,354.92 (R. 30). This deficiency was arrived at by disallowing the deduction of the claimed loss on the purported sale of the 18,300 shares of National City Bank stock and the inclusion in gross income of the $666,666.67 distribution from the management fund received by the respondent on July 1, 1929. (R. 31.) The item of $728,709.84, set out in the first count of the indictment is identical with the deficiency, except that the 50% addition to the deficiency by reason of fraud was not involved in the indictment. (R. 155.)

The item of the indictment and the deficiency arose from the same transactions of the respondent. (R. 155.)

On the basis of the deficiency letter the respondent appealed to the Board. (R. 6–28.) The Board held that the deficiency was due, either in whole or in part, to fraud with intent to evade tax; and that the prior acquittal in the criminal proceeding did not afford a basis for either the defense of *res judicata* or double jeopardy. (R. 156–173.) The result was that the deficiency for the year 1929 was sustained. (R. 210–211.) The respondent petitioned for review. (R. 211.) The Circuit Court of Appeals for the Second Circuit upheld the deficiency but held that the 50% addition thereto was barred by reason of the prior acquittal in the criminal proceeding. (R. 828.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the respondent's acquittal in the prior criminal proceeding under Section 146 (b) of the Revenue Act of 1928 constituted a bar to the 50 per centum addition to the deficiency by reason of fraud under Section 293 (b) of the Revenue Act of 1928.

2. In holding and treating Section 293 (b) of the Revenue Act of 1928 as criminal in nature.

3. In not affirming the decision of the Board of Tax Appeals *in toto*.

REASONS FOR GRANTING THE WRIT

1. The decision below vitally and adversely affects the revenue and is therefore one of great pub-

lic interest and importance. Under the ruling of the Circuit Court of Appeals, which the court thought required by *Coffey* v. *United States*, 116 U. S. 427, and *United States* v. *La Franca*, 282 U. S. 568, the provisions of Section 293 (b) of the Revenue Act of 1928 are treated as added punishment for the offense defined in Section 146 (b) of the same Act. Section 293 (b) had its inception in Section 14 of the Act of 1864 (c. 173, 13 Stat. 223, 226–227). With slight changes Section 14 is now embodied in Section 3176 of the Revised Statutes. Section 3176 was made expressly applicable to the income tax by Section II I of the Revenue Act of 1913 (c. 16, 38 Stat. 114, 179) and was so continued by Section 16 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 775). In the Revenue Act of 1918, Section 250 (b) (c. 18, 40 Stat. 1057, 1083), a separate provision in lieu of, but similar to, Section 3176 of the Revised Statutes was adopted. With minor changes this part of Section 250 (b) has been continued in Section 250 (b) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 264), Section 275 (b) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253, 298) and 1926 (c. 27, 44 Stat. 9, 57) and as Section 293 (b) of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 858), and subsequent Acts. The Congress has always treated this provision as providing an addition to the tax and as being distinct and apart from the criminal penalties. The criminal provisions stem from Section 15 of the Act of 1864 (c. 173, 13 Stat. 223, 227).

Section 15 appears as Section 3179 of the Revised Statutes. The criminal provisions under the income tax laws are to be found in Section II F and G (d) of the Revenue Act of 1913, Section 18 of the Revenue Act of 1916, Section 1209 of the Revenue Act of 1917, Section 253 of the Revenue Acts of 1918 and 1921, Section 1017 of the Revenue Act of 1924, Section 1114 of the Revenue Act of 1926, and Section 146 of the Revenue Acts of 1928, 1932, 1934 and 1936.

The effect of the decision below is to consolidate the civil and criminal provisions and treat the civil provision as fixing an added or additional punishment for the criminal offenses defined by Section 146 (b). This was the construction placed upon Sections 250 and 253 of the Revenue Act of 1921 in *Hanby* v. *Commissioner* 67 F. (2d) 125 (C. C. A. 4th). Under this holding it may possibly be contended that the 50 per centum addition to the tax can only be imposed in the event of a conviction under Section 146 (b), on the ground that a person cannot be punished for the commission of a crime whereof he has not been indicted, tried and convicted. On the same theory the jurisdiction of the Board of Tax Appeals to consider an addition to a deficiency under Section 293 (b) may be questioned and contested by counsel for taxpayers. Hence, the administrative practice of more than half a century is threatened with overturn and a provision which has always been considered by the

administrative officers of the Government to be purely civil in nature must, under this decision, be treated as criminal in nature. Thus the Government is left without any civil safeguard to protect its revenues against fraud or to compensate it for the added effort and expense of investigating and discovering fraud. Indeed, under the *La Franca* case, where it was stated that a statute authorizing the collection of a criminal penalty by a suit civil in form following a criminal conviction would raise grave constitutional doubts, there is doubt as to whether the decision below leaves any field for the valid operation of Section 293 (b). See also *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386. This result, we submit, not only overturns the long settled administrative practice, but violates the Congressional intent and removes a necessary safeguard for the protection of the revenue. If the decision of this Court in *Coffey* v. *United States*, *supra*, compels this result (and we do not believe that it does), we respectfully request the Court to reexamine and overrule that case.

2. We submit that the decision in the instant case is in direct conflict with *McDowell* v. *Heiner*, 15 F. (2d) 1015 (C. C. A. 3d), [adopting the opinion of the District Court, 9 F. (2d) 120 (W. D. Pa.)], certiorari denied, 273 U. S. 759. In that case the Commissioner asserted deficiencies for the years 1913 to 1919, inclusive, together with 100% addi-

tions thereto for the years 1913 to 1917, inclusive, by reason of fraud under Section 3176 of the Revised Statutes, as amended, and 50% additions thereto for the years 1918 and 1919, by reason of fraud under Section 250 (b) of the Revenue Act of 1918. The taxpayer brought suit against the Collector to enjoin him from collecting the 100% and 50% additions to the tax. The taxpayer urged that the additions were not true taxes but constituted punishment for crime whereof he had not been tried and convicted, and that Section 3224 of the Revised Statutes was not applicable. The court overruled these contentions and dismissed the bill, clearly holding that the statutes there involved were not punitive in nature or purpose. No material distinction exists between Section 3176 of the Revised Statutes and Section 250 (b) of the Revenue Act of 1918, involved in *McDowell* v. *Heiner, supra,* and Section 293 (b) involved in the instant case. In this case the court below has treated Section 293 (b) as punitive in nature, and that treatment is the necessary basis of the decision. (See R. 827.)

This result is not only contrary to *McDowell* v. *Heiner, supra,* but conflicts in principle with the rule announced in *Dorsheimer* v. *United States,* 7 Wall. 166, 173, that penalties inflicted upon persons who attempt to defraud the revenue have as their purpose the enforcement of the collection of duties and taxes. A like conflict in principle exists be-

tween the decision below and *Passavant* v. *United States,* 148 U. S. 214, and *Bartlett* v. *Kane,* 16 How. 263, where this Court pointed out that additional customs duties of 20 per cent, imposed under the tariff acts when the value of imported goods exceeds the declared value by more than 10 per cent, were designed to discourage undervaluation of imported merchandise, to prevent efforts to escape the legal rate of duty, and to discourage fraud. Fundamentally, there is no distinction between the addition to the tax under Section 293 (b) of the Revenue Act of 1928 and the additional duties imposed by the tariff acts and involved in the *Passavant* and *Bartlett* cases. One is to prevent the understatement of income and the others are to prevent the undervaluation of imported merchandise. The additions to the tax imposed by Section 293 (b) are clearly an exercise of the taxing power and a necessary civil safeguard to prevent understatement of income. In this respect they are quite different from the exaction involved in the *La Franca* case.

3. An acquittal in a criminal proceeding does not afford a basis for a plea or defense of *res judicata* or double jeopardy in a subsequent civil proceeding, because of the fundamental differences in the nature of the two proceedings. The opinion below is not wholly clear as to whether the decision is based upon the doctrine of *res judicata* or upon double jeopardy. If based upon *res judicata,* as

seems more probably to be the case, it conflicts with the decisions of this Court in *Lewis* v. *Frick*, 233 U. S. 291, and *Murphy* v. *United States*, 272 U. S. 630. In *Lewis* v. *Frick*, an alien was ordered deported on the ground that he had brought a woman into this country for immoral purposes. He filed a petition for a writ of habeas corpus on the ground that the issue in the deportation proceeding was *res judicata* by reason of his acquittal of the same charge in a prior criminal proceeding. The writ was denied. This Court pointed out (at p. 302) that "the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." In *Murphy* v. *United States, supra,* the defendants were acquitted of the criminal charge of maintaining a nuisance in violation of the National Prohibition Law. Subsequently, an action was brought in equity under the provisions of another section of the same law to abate the same nuisance. The defendants plead their former acquittal and contended that the statute under which the equity suit was maintained imposed an additional penalty and that, having been acquitted of the crime, they could not be punished for it in a second proceeding. This Court held that the judgment of acquittal did not make the issues in the subsequent civil case *res judicata,* and that the second proceeding did not

have as its objective punishment of the defendants for the crime of which they had been acquitted. Hence, the decision below conflicts in principle with the *Murphy* case regardless of whether it is based on *res judicata* or on double jeopardy.

Wherefore it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

AUGUST 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 835, 858:

SEC. 146. PENALTIES.

(a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a

corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 791. *Penalties.*—The penalties provided for in section 146 can not be assessed but are enforceable only by suit or prosecution. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES E. MITCHELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 79–107) is reported in 32 B. T. A. 1093. The opinion of the Circuit Court of Appeals (R. 442–449) is reported in 89 F. (2d) 873.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 17, 1937 (R. 449). The petition for a writ of certiorari was filed August 17, 1937 (R. 450), and granted October 11, 1937 (R. 449). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer was indicted under Section 146 (b) of the Revenue Act of 1928 for a willful attempt to evade and defeat taxation. Does his acquittal bar the Commissioner from asserting, under Section 293 (b) of the Revenue Act of 1928, a 50% addition to the tax deficiency by reason of "fraud with intent to evade tax"?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 65–69.

STATEMENT

In his income tax return for the year 1929 the respondent claimed, and deducted from gross income, an alleged loss of $2,872,305.50 from a purported sale of 18,300 shares of National City Bank stock to his wife (R. 48). The respondent also failed to return as income an item of $666,666.67, received by him on July 1, 1929, as a distribution from the management fund of the National City Company, of which he was chairman (R. 48).

On April 25, 1933, an indictment was returned against the respondent by a grand jury of the District Court of the United States for the Southern District of New York. The indictment contained two counts. Only the first count is here material. That count charged that the respondent "unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income

tax of, to-wit, $728,709.84, upon his net income for 1929'' (R. 78–79). Thereafter the respondent was tried upon the charges contained in the indictment before the court and a jury. The trial commenced on May 11, 1933, and terminated on June 22, 1933, when the jury returned a verdict of not guilty on all counts (R. 79).

On December 8, 1933, the Commissioner asserted a deficiency against the respondent for the year 1929 in the amount of $728,709.84, together with a 50% addition thereto by reason of fraud in the amount of $364,354.92 (R. 15). This deficiency was arrived at by disallowing the deduction of the claimed loss on the purported sale of the 18,300 shares of National City Bank stock and by including in gross income the $666,666.67 distribution from the management fund received by the respondent on July 1, 1929 (R. 16). The item of $728,709.84, set out in the first count of the indictment, is the same item as that involved in the deficiency, but the 50% addition to the deficiency by reason of fraud was not involved in the indictment (R. 79). The item of the indictment and the deficiency arose from the same transactions of the respondent (R. 79).

From the determination of this deficiency the respondent appealed to the Board (R. 3–14). The Board held that the deficiency was due, either in whole or in part, to fraud with intent to evade tax; and that the prior acquittal in the criminal proceed-

ing did not afford a basis for either the defense of *res judicata* or double jeopardy (R. 79–88). The result was that the whole deficiency for the year 1929 including the 50% addition was sustained (R. 107–108). The respondent petitioned for review (R. 108). The Circuit Court of Appeals for the Second Circuit upheld the deficiency for the ordinary tax but held that the 50% addition thereto was barred by reason of the prior acquittal in the criminal proceeding (R. 448–449). The Commissioner's petition for a writ of certiorari, filed on August 17, 1937, was granted (R. 449). The respondent herein filed a petition for certiorari on August 12, 1937, from so much of the judgment below as upheld the claim of the Commissioner for the ordinary tax. That petition was based mainly upon the fact that the deficiency, in the absence of a finding of fraud, would be barred by the two-year statute of limitations; and upon the argument that the absence of fraud in this case was *res judicata* under the decision in *Coffey* v. *United States,* 116 U. S. 436. Respondent's petition was denied by this Court on October 11, 1937, No. 307, October Term, 1937.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the respondent's acquittal in the prior criminal proceeding under Section 146 (b) of the Revenue Act of 1928 constituted a bar to

the fifty per centum addition to the deficiency by reason of fraud under Section 293 (b) of the Revenue Act of 1928.

2. In holding and treating Section 293 (b) of the Revenue Act of 1928 as criminal in nature.

3. In not affirming the decision of the Board of Tax Appeals *in toto*.

SUMMARY OF ARGUMENT

1

The fifty per centum addition to the deficiency does not constitute additional punishment for the crime of which respondent was acquitted, and therefore is not barred on the ground of double jeopardy. The addition is imposed under Section 293 (b) of the Revenue Act of 1928 as an addition to, and a part of, a deficiency determined to be due to fraud with intent to evade tax. Provisions of similar import have existed in both the internal revenue and the customs laws for more than a century. The addition is clearly civil in nature and effect, imposed under and as an exercise of the taxing power; it is compensatory in nature; and it constitutes a valid incidental safeguard for the protection of the revenue by discouraging fraud. It has been so considered and treated by the Congress, and by the administrative officers of the Government. Like additions have been so considered and treated by the courts in a long line of decisions. The decision below by treating Section 293 (b) as

punitive in nature and effect is in direct conflict with this historic position, and, if sustained, would seriously impair and probably destroy the effectiveness of such provisions in our internal revenue and customs laws. The court below erroneously applied the decision of this Court in *Coffey* v. *United States,* 116 U. S. 436, as necessitating this result. If we are wrong in this view, then we respectfully submit that the *Coffey* case should be reexamined and either modified or overruled.

II

The issue of fraud involved under Section 293 (b) is not *res judicata* by reason of the prior acquittal in the criminal case. The doctrine of *res judicata* is essentially one against re-litigation. Where a claim or demand has proceeded to judgment, it may not again be litigated. However, where a second proceeding is upon a different claim or demand from that litigated in a prior proceeding, as is the case here, the rule applies only to issues common to both and actually adjudicated in the first. The doctrine does not apply to the instant case, because: (1) it is inapplicable to a civil proceeding following an acquittal in a prior criminal prosecution since the requisite quantum of proof is different in the two cases; (2) the two proceedings are different in nature and consequences; (3) the issue in the present proceeding is different from that litigated in the criminal case;

and, (4) the application of the doctrine in the instant case would remove an important civil safeguard provided by Congress for the protection of the revenue.

ARGUMENT

The court upheld the item of the deficiency relating to the normal tax but modified the order of the Board by ordering expunged that part of the deficiency represented by the fifty per centum addition thereto (R. 442–449). The court held that the addition to the deficiency was barred by reason of the acquittal in the prior criminal proceeding. This holding was said by the court below (R. 448) to be compelled by the decisions of this Court in *Coffey* v. *United States,* 116 U. S. 436; and *United States* v. *La Franca,* 282 U. S. 568. However, in both of those cases the second proceeding was essentially criminal in nature and punitive in purpose, whereas the additional tax in the present case is purely civil in nature, operation, and purpose. The court below stated that "Though this rule [of the *Coffey* case] seems hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility, it is implicit in the decision of *Coffey* v. *United States* which is binding on us in the absence of a modification by the Supreme Court" (R. 448). This language justifies the inference, we believe, that the court below doubted the soundness of its decision herein and felt that the decision in the *Coffey* case should be modified or overruled.

The opinion below is not clear as to whether the decision is based upon double jeopardy or upon *res judicata.* (1) If based upon double jeopardy, the court has either misapplied the *Coffey* case, or, if that case was correctly applied, then, we submit, it should be modified or overruled. Moreover, the decision below misapplied the *La Franca* case, and is in conflict with *McDowell* v. *Heiner,* 15 F. (2d) 1015 (C. C. A. 3d) [adopting the opinion of the District Court, 9 F. (2d) 120 (W. D. Pa.)], certiorari denied, 273 U. S. 759, and other decisions. The holding below is contrary to the Congressional intent and the administrative practice of many years standing. (2) If the decision below was based upon the doctrine of *res judicata,* it is contrary to the decisions of this Court in *Lewis* v. *Frick,* 233 U. S. 291, and *Murphy* v. *United States,* 272 U. S. 630.

I

THE FIFTY PER CENTUM ADDITION TO THE DEFICIENCY DOES NOT CONSTITUTE ADDITIONAL PUNISHMENT FOR THE CRIME OF WHICH THE RESPONDENT WAS ACQUITTED AND THEREFORE IS NOT BARRED ON THE GROUND OF DOUBLE JEOPARDY

The court below stated that the question was whether the fifty per centum additional tax was designed to punish fraudulent tax dodgers or was a mere preventive measure (R. 448), and concluded that it was required to treat the imposition of the penalty of fifty per centum as barred by the prior acquittal of the respondent in the criminal action

(R. 448). The court felt that this holding was required by the *Coffey* and *La Franca* cases.

The respondent's defense to the fifty per centum addition to the deficiency is in substance a plea of *autrefois acquit*. His position is that he has been tried and acquitted under Section 146 (b) of the Revenue Act of 1928; and that the assertion of the additional tax under Section 293 (b) constitutes an attempt to punish him for the crime of which he has been acquitted and again places him in jeopardy for the same offense. In speaking of a plea of *autrefois acquit* this Court said in *Burton* v. *United States*, 202 U. S. 344, 380:

> A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. 4 Bl. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, "was the same *in law* and *in fact*. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" *Commonwealth* v. *Roby*, 12 Pick. 496, 504. * * *

It is clear that the criminal prosecution and the present case are not the same in point of law.

Section 146 (b) of the Revenue Act of 1928, the statute under which the respondent was indicted and tried, provides in part that "* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof," shall be guilty of a felony and upon con-

viction thereof shall be subject to fine or imprisonment, or both. But the fifty per centum addition to the tax is imposed by Section 293 (b) of the Revenue Act of 1928, which provides in part that "If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency)" shall be assessed, collected, and paid in lieu of the addition to the tax imposed by Section 3176 of the Revised Statutes, as amended.

The court below treated the provisions of Section 293 (b) as adding punishment for the offense defined in Section 146 (b). But this, we submit, was clearly erroneous. The court's holding (1) ignores the legislative history of these sections; (2) conflicts with a long line of judicial decisions which construe predecessors of these sections and similar provisions in the internal revenue and customs laws; (3) refuses to recognize the civil, compensatory nature of the 50% addition; (4) fails to consider the nature of Section 293 (b) as imposing a special surtax based upon the classification of fraud; (5) unnecessarily casts serious constitutional doubt upon the administrative application of Section 293 (b) as a civil safeguard for the protection of the revenue; and (6) misconstrues and misapplies the decisions relied upon.

(1) *The legislative history shows that Congress intended the 50% addition under Section 293 (b)*

to be a civil safeguard for revenue assessment and collection entirely apart, and distinct, from the criminal punishments provided in Section 146 (b). Section 293 (b) of the Revenue Act of 1928 had its inception in Section 14 of the Revenue Act of 1864 (c. 173, 13 Stat. 223, 226–227). With slight changes Section 14 of the Act of 1864 is now embodied in Section 3176 of the Revised Statutes. Section 3176 was made expressly applicable to the income tax by Section II I of the Revenue Act of 1913 (c. 16, 38 Stat. 114, 179), and was so continued by Section 16 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 775). In the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1083), Section 250 (b) inserted a separate provision for the income tax in lieu of, but similar to, Section 3176 of the Revised Statutes. With minor changes this part of Section 250 (b) has been continued in Section 250 (b) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 264); Section 275 (b) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253, 298) and 1926 (c. 27, 44 Stat. 9, 57), and as Section 293 (b) of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 858), and subsequent Revenue Acts.

The criminal provisions stem from Section 15 of the Revenue Act of 1864 (c. 173, 13 Stat. 223, 227). Section 15 of the Revenue Act of 1864 appears as Section 3179 of the Revised Statutes. The criminal provisions under the income-tax law are to be found in Section II F and G (d) of the Reve-

nue Act of 1913 (c. 16, 38 Stat. 114, 171, 177); Section 18 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 775); Sections 1004 and 1209 of the Revenue Act of 1917 (c. 63, 40 Stat. 300, 325, 336); Section 253 of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1085) and 1921 (c. 136, 42 Stat. 227, 268); Section 1017 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 343); Section 1114 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 116); Section 146 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 835); and, Section 145 of the Revenue Acts of 1932 (c. 209, 47 Stat. 169, 217), 1934 (c. 277, 48 Stat. 680, 724), and 1936 (c. 690, 49 Stat. 1648, 1703).

It is clear that the Congress has treated the provision for the fifty per centum addition to the tax contained in Section 293 (b) of the Revenue Act of 1928 as providing an addition to the tax and as being entirely separate, distinct, and apart from the criminal penalties imposed by the revenue laws. For example, in the Revenue Act of 1928, Section 146, dealing with felonies and misdemeanors, is entitled "Penalties," while Section 293 is entitled "Additions to the Tax in Case of Deficiency" and is contained in Supplement M entitled "Interest and Additions to the Tax." Section 291, being the first section under Supplement M, imposes an addition to the tax in case of failure to file a return. Section 292 fixes the rate of interest to be paid on deficiencies. Section 293 (a) imposes an addition to the deficiency where it is due to negligence or

intentional disregard of rules and regulations but without intent to defraud. Section 293 (b), the provision herein involved, imposes an addition to the deficiency where it is due to fraud with intent to evade tax and Section 294 imposes an addition to the tax in case of nonpayment. Each of these provisions is clearly a part of the same statutory pattern. They constitute civil incidents and safeguards to the proper assessment and collection of the income tax, which, it must be remembered, is in the first instance computed and assessed by the individual taxpayer in the return prepared and filed by him.

Thus Section 293 (b) does not purport to create a distinct criminal offense. Nor does it constitute an additional punishment for a criminal offense under Section 146 (b), since the fifty per cent addition may be imposed without a showing of the elements requisite to a criminal charge under Section 146 (b). See pp. 45, 60, *infra*.

(2) *The courts have uniformly treated Section 293 (b), its statutory predecessors and similar provisions in the internal revenue and customs laws as entirely civil in effect.* It is a matter of small consequence whether the additional tax be called a "penalty" or an "addition." It may be conceded that the addition to the tax imposed by Section 3176 of the Revised Statutes, as amended, was referred to as a penalty in 17 Op. A. G. 433 (1882), and has been so denominated in decisions of the courts. That does not, however,

render the imposition punitive in nature or penal in effect. See *Tayloe* v. *Sandiford,* 7 Wheat. 13, 17; *Stearns* v. *United States,* 22 Fed. Cas. 1188, 1192 (C. C. Vt.).[1] The decisions of this Court recognize two classes of penalties: (1) those imposed as punishment for crime, such as were involved in *United States* v. *La Franca,* 282 U. S. 568; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386; *Lipke* v. *Lederer,* 259 U. S. 557; and *Wong Wing* v. *United States,* 163 U. S. 228; and (2) those which do not follow as a result of the

[1] Nor does the mere fact that the addition to tax imposes a pecuniary detriment indicate that Section 293 (b) is punitive in nature. As long ago as *Taylor* v. *United States,* 3 How. 197, 210, Mr. Justice Story pointed out that a tax proceeding does not have punishment as its objective because pecuniary detriment is inflicted. The argument that because a detriment results the objective is punishment was rejected in *Murphy* v. *United States,* 272 U. S. 630. This Court there pointed out through Mr. Justice Holmes (p. 632) that the fact that the subsequent civil proceeding imposes "a punishment is the only ground upon which the former [criminal] judgment would be a bar."

It has even been held that disbarment, although it undeniably results in detriment, is not punishment, because the primary objective of the proceeding is not punishment. *Ex parte Wall,* 107 U. S. 265; *Matter of Rouss,* 221 N. Y. 81. Accordingly, "An acquittal of alleged crime is not a bar to a proceeding by the state to revoke the accused's license to practice medicine or law for the same act." 2 Freeman on Judgments, 5th Ed., p. 1386. See also *Shea* v. *Evenson,* 159 Wis. 623; *State* v. *Corron,* 73 N. H. 434; *In re Registration of Campbell,* 197 Pa. 581; *In re Newell Smith,* 10 Wend. (N. Y.) 449; *In re Thresher,* 33 Mont. 441; *In the Matter of* ———————, *an attorney,* 86 N. Y. 563; *People* v. *Weeber,* 26 Colo. 229; *People* v. *Thomas,* 36 Colo. 126; *State* v. *Cary,* 135 La. 579.

commission of crime, but are mere sanctions to enforce obligations validly imposed by the Congress. See *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 329. The penalties of the first class may not be collected by distraint or by administrative action and would be barred by an acquittal in a prior criminal prosecution for the crime for which such penalties are a part of the punishment. See *Lipke* v. *Lederer*, and other cases, *supra*. But that is not true of penalties of the second class. Such penalties may be enforced by administrative action as well as by actions at law. As stated by this Court in *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339:

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

In support of this holding the Court cited *Bartlett* v. *Kane*, 16 How. 263 (penalty for undervaluation of imports); *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272 (recovery

of amount of defalcation by distraint); and *Passavant* v. *United States,* 148 U. S. 214 (penalty for undervaluation of imports). The distinction was stated as follows in *United States* v. *Nash,* 111 Fed. 525, 528 (W. D. Ky.):

> The court, however, is of opinion that, while the word "penalty" has a broader meaning than the word "fine," still that a fine, in the judicial sense, is always a penalty, although a penalty may sometimes not be a fine, or even a criminal punishment. For example, penalties are often inserted in bonds, official or otherwise, as a measure of damages, and the enforcement of them in no way invokes the criminal processes of the courts. Sometimes, when taxes are not paid when due, a penalty is added; but in such instances no crime has been committed, and the word "penalty" is used in a restricted sense, and does not include any idea of criminal punishment. It is rarely, if ever, made a criminal offense, by express provisions of the statutes, to omit to pay taxes at the exact time when they become due, and the enlargement of the amount of taxation which results from such failure is measured by way of interest or otherwise. * * *

That the addition to the tax prescribed by Section 293 (b) is one of the second class referred to above and falls within the rule of the *Oceanic Navigation Co.* case, *supra,* there can be no doubt. As early as 1868, this Court, in *Dorsheimer* v. *United States,* 7 Wall. 166, said (at p. 173):

> The purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit. * * *

In the year 1872, *Doll* v. *Evans,* 7 Fed. Cas. 855 (C. C. E. D. Pa.), upheld the determination by the internal revenue officials of a penalty of 100 per centum prescribed by Section 14 of the Revenue Act of 1864, *supra,* for a false statement of income. The penalty had been collected along with additional taxes by distraint. The court said (at p. 857):

> The remaining cause of demurrer is, that the act of congress, in so far as it imposes a penalty for a false or fraudulent return, is unconstitutional. The act does not invest the assessor with power to "sentence" anybody; it does not even allow him any discretion as to the penal increase of the tax. It authorizes him to inquire whether the return is false or fraudulent, and if he so finds, requires him to add one hundred per centum to the tax. This is not conferring judicial power upon him, within the meaning of the constitution. It is simply empowering him to ascertain a fact, according to which he is to adjust the amount of the tax imposed by law. That this function is judicial in its nature there is no doubt, but so are many like functions committed to public officers, as essential to the performance of their official

> duties. They are within the competency of congress to confer, as necessarily incident to the execution of its expressly granted powers.
>
> The acts of congress furnish many examples of this. They are to be found especially in the laws relating to the collection of customs; and the validity of such legislation has never been denied. * * *

Again in *Clay* v. *Swope,* 38 Fed. 396 (C. C. Ky.), decided in 1889, an administrative determination of five per centum additional tax under Section 3184 of the Revised Statutes for failure to pay an internal revenue tax was sustained. The Collector, after imposing the additional tax, compelled its payment by a threat of distraint upon the property. The additional tax was held to be a civil penalty and the court pointed out (at p. 399) that "undoubtedly congress has the constitutional right and authority to enact laws which it may deem necessary and proper to secure the collection of the internal taxes which it may constitutionally impose."

Other statutes empowering officials to add penalties for noncompliance with statutory requirements are the Act of August 30, 1842 (c. 270, 5 Stat. 548, 564), Section 17; the Act of July 30, 1846 (c. 74, 9 Stat. 42, 43), Section 8; the Act of June 10, 1890 (c. 407, 26 Stat. 131, 134), Section 7; the Act of July 24, 1897 (c. 11, 30 Stat. 151, 212), Section 32. Each of these Acts imposes an additional duty for the undervaluation of imported goods.

Section 8 of the Tariff Act of July 30, 1846, was involved in *Bartlett* v. *Kane, supra.* That statute imposed an additional duty of twenty per centum for undervaluation of imported goods. In speaking of additional duties, the Court said (at p. 273):

> An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an under-valuation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. * * *

In the same case the Court was careful to point out (at p. 274): "A construction, which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing." In *Passavant* v. *United States, supra,* the Court was considering additional customs duties imposed by Section 7 of the Act of June 10, 1890 (c. 407, 26 Stat. 131). In speaking of such additional duties the Court said (at p. 221):

> They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character. * * *

31569—37——4

In *Helwig* v. *United States,* 188 U. S. 605, it was decided that additional duties imposed by Section 7 of the Act of June 10, 1890, *supra,* were "penal" for the purposes of a statute which excepted "penalties" from the jurisdiction conferred upon the circuit courts. In the opinion, the Court speaks of the imposition of the additional sums, which were over five times more than the normal duties, as punitive. But the transactions involved in the *Helwig* case arose before the passage of Section 32 of the Act of July 29, 1897, *supra;* and the Court recognized (p. 616) that in this later Act, which cut the rate of additional duties in half, Congress had removed any doubt of its intention by specifically providing that the additional duties should not be construed to be penal.

Statutes providing for additions to taxes or duties for failure to make returns, or for making incomplete or false returns, and for their imposition and collection by administrative action as a part of such taxes or duties, and as civil incidents and safeguards to the collection of such taxes and duties, have been in force during the greater part of the period of the existence of this Government. During all this time it is clear that the Congress, the administrative officers of the Government, and the courts have considered such additions or penalties as necessary and proper civil safeguards for the protection of the revenue. This long established and uniform history and course of conduct

constitutes an impelling construction of statutes imposing additions to tax as being strictly civil in effect.[2]

That the addition to the tax imposed by Section 3176 of the Revised Statutes, and similar provisions, is civil in nature and effect is also shown by cases dealing with the method of collection of additional taxes and penalties. In *Thome* v. *Lynch,* 269 Fed. 995 (Minn.), a case which preceded *Lipke* v. *Lederer, supra,* in holding that the so-called taxes imposed by Section 35 of the National Prohibition Act were not taxes and could not be collected by distraint, it was said (at p. 1002):

> * * * under section 3187, R. S. (Comp. St. § 5909), the collector of internal rev-

[2] It has been recognized since *Stuart* v. *Laird,* 1 Cranch 299, 309, decided in 1803, that a long continued practice with respect to the construction of a provision is of the greatest significance. It was there said: "To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." This rule has been recognized both with respect to Congressional construction [*Cincinnati Soap Co.* v. *United States,* 301 U. S. 308; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 328–329, and cases there cited] and administrative treatment [*Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378]. See also, *Ozawa* v. *United States,* 260 U. S. 178, 194; *Brown* v. *Duchesne,* 19 How. 183, 194.

> enue, though authorized to collect taxes by distraint, was not authorized to collect penalties in general by that method, but only certain specified penalties, viz., the 5 per cent. penalty added under section 3184 (Comp. St. § 5906) *and by express provision in section 3176 the penalty therein provided; both of these penalties being added to taxes, properly so called—that is, exactions for revenue for government use.* [Italics ours.]

In *Kausch* v. *Moore,* 268 Fed. 668 (E. D. Mo., 1920), where a holding similar to that in the *Thome* case was made, it was also said (at pp. 672–673):

> If the penalty here in question could be viewed merely as an integral part of the taxes charged, or as in the nature of a surtax thereon, and not as merely punitory, some authority to uphold distraint for its summary collection might be found in the cases. * * *

In *Middleton* v. *Mee,* 277 Fed. 492 (S. Dak.), it was said (at p. 498) that Section 3187 of the Revised Statutes:

> * * * while authorizing the collector of internal revenue to collect taxes by distraint, does not pretend to authorize the collection of penalties by that method, but only certain specified penalties that attach to the taxes, legally levied, for nonpayment on demand, etc. In this statute these penalties are clearly additions provided by the statute for purposes of revenue.

Again, as showing that the addition to the tax imposed is truly a tax and not punishment for crime, a taxpayer cannot invoke the aid of equity to enjoin the collection thereof under Section 3224 of the Revised Statutes. This is clearly shown by the opinion of the court in *Kohlhamer* v. *Smietanka,* 239 Fed. 408 (N. D. Ill.), where it was said (at p. 412):

> While it is true that section 3224 does not specifically include "penalties" as such, those here sought to be collected are such an integral part of the tax and so interwoven into the tax as to be a part of it. Section 3176, R. S. (Comp. St. 1913, § 5899), being one of the administrative sections referred to in section 23 of the act under consideration, provides that the amount fixed as a penalty shall be "added to the tax," and "collected at the same time and in the same manner," *and as a part of the tax,* etc.

This application of Section 3224 appears to be recognized in *Thome* v. *Lynch, supra; Kausch* v. *Moore, supra;* and *Middleton* v. *Mee, supra.* See also, *Czieslik* v. *Burnet,* 57 F. (2d) 715, 717 (E. D. N. Y.). Under these decisions it is clear that the addition to the deficiency imposed by Section 293 (b) is a part of the tax, and as such is intended purely for revenue purposes and not as punishment for crime.

This was the clear import of *McDowell* v. *Heiner,* 15 F. (2d) 1015 (C. C. A. 3d) [adopting the opinion

of the District Court, 9 F. (2d) 120 (W. D. Pa.)], certiorari denied, 273 U. S. 759. The taxpayer there sought to enjoin the assessment and collection of additions to his taxes imposed by the Commissioner under Section 3176 of the Revised Statutes. The case was heard on bill and answer and the bill was dismissed. The District Court there pointed out and emphasized the distinction between civil penalties and criminal punishment as follows (pp. 122–123):

> The results which follow in the two cases are wholly distinct and different in their purpose; the one is a criminal action instituted by the sovereign power for the punishment of crime, after indictment, trial, and conviction. The other is to enforce the collection of the taxes imposed. * * *
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> * * * * *
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> It is one thing to charge a party with a crime. It is a wholly different thing to charge the existence of facts as the basis for the enforcement of a penalty by civil suit, or by the action of administrative officers, although such facts may constitute a crime.
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> * * * * *
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> The Constitution does not guarantee trial by jury for the imposition of penalties for the nonpayment of taxes. None of the constitutional provisions relative to the right of trial by jury have any application here, as the plaintiff is not being tried for a crime. * * *

See also, *Hepner* v. *United States,* 213 U. S. 103, 106–108; *Stockwell* v. *United States,* 13 Wall. 531.

Since the addition to the tax imposed by Section 293 (b) is not punishment for crime but a mere sanction to enforce obligations validly imposed by the Congress, it follows that safeguards against double jeopardy have no application to the instant case. See *Castle* v. *United States,* 17 F. Supp. 515 (C. Cls.) [citing with approval the Board decision in this case]. In *Slick* v. *United States,* 1 F. (2d) 897 (C. C. A. 7th, 1924), the Commissioner had asserted and collected an addition to the tax by reason of fraud. Thereafter, the taxpayer was indicted. To the indictment he pleaded double jeopardy by reason of the collection of the additional tax. The Circuit Court of Appeals, citing *Kepner* v. *United States,* 195 U. S. 100, dismissed this contention as being without merit.

Thus, there is a long line of judicial decisions treating Section 293 (b) and its statutory antecedents, as well as similar provisions in the customs laws, as entirely civil in nature. The reasoning of the court in *Hanby* v. *Commissioner,* 67 F. (2d) 125 (C. C. A. 4th), presents an erroneous deflection from this otherwise unbroken line of decisions, and that reasoning should be repudiated by the Court so that the law on this subject may remain clear. In the *Hanby* case, the Commissioner asserted a deficiency, including a 50% addition under Section 250 (b) of the Revenue

Act of 1921. The taxpayer, who had been indicted and convicted under Section 253 (b) of the 1921 Act, pleaded double jeopardy. The court sustained the Commissioner's determination, and that result we believe was clearly correct. However, the court gratuitously assumed that the Congress had intended to punish fraudulent conduct not only by fine and imprisonment under Section 253 (b), but also by the added penalty under Section 250 (b). The court then reasoned that double jeopardy did not apply since the 50% addition under Section 250 (b) was not a *second* punishment for the crime for which the taxpayer was convicted under Section 253 (b) but constituted together with fine and imprisonment under Section 253 (b) the *whole* punishment for unlawful and fraudulent conduct. When this reasoning in the *Hanby* case is considered together with the holding of the court below in the instant case, it might be contended that the fifty per centum addition to the tax here could only be imposed in the event of a conviction under Section 146 (b) on the ground that punishment for crime may only be imposed after proper trial and conviction. But such a result is clearly contrary to the intent of Congress and conflicts with the continuous judicial construction of this and like statutes.

(3) *The fifty per centum addition under Section 293 (b) compensates the Government for the added expense of collection of taxes occasioned by*

fraudulent concealment.—Section 293 (b) operates, not as a punitive, but as a compensatory measure. The elements of civil fraud were pointed out in *Southern Development Co.* v. *Silva,* 125 U. S. 247, 250. Of these elements, secrecy and concealment predominate in an income tax fraud. To establish fraud in such a case, it is generally necessary for experienced revenue agents patiently to uncover the obscured facts underlying a fabricated picture. Many times the Government is impeded in this difficult task by deliberate attempts at further concealment of facts. Frequently a fraud case requires months and sometimes years of effort. Such work is essential in determining the true concealed tax liability. The additional expense occasioned by the fraud is necessarily great. In the absence of a provision such as Section 293 (b), the costs and expenses of investigation caused by the dishonest taxpayer would fall upon the honest taxpayer. Section 293 (b) puts the burden of such expense upon him who should properly bear it—the particular dishonest taxpayer. The section represents a remedial effort by Congress to fix the damages resulting to the Government in fraud cases and to impose those damages on the particular persons responsible.

As long ago as 1871 this Court, in *Stockwell* v. *United States,* 13 Wall. 531, expressed the view that a provision contained in Section 2 of the Act of March 3, 1823 (c. 58, 3 Stat. 781), was com-

pensatory in nature. That statute provided that any person who received, concealed, or bought goods with the knowledge that they had been illegally imported should pay a sum double the amount or value of such goods. In holding this provision to be compensatory in nature, the Court said (at pp. 546–547):

> It was to secure indemnity for a wrong to rights of property. * * * If any person receives them, knowing them to have been illegally imported, or conceals them, or buys them, his act necessarily embarrasses, if it does not defeat altogether the possibility of the government's availing itself of its right and securing the property. It is therefore manifest that the act of 1823 was fully as remedial in its character, designed as plainly to secure civil rights, as are the statutes rendering importers liable to duties. Its plain purpose was to protect the government in the unembarrassed enjoyment of its rights to all goods and merchandise illegally imported, and it proportioned indemnity for infringement upon such rights to the loss which such infringement might cause. The amount recoverable is in proportion to the value of the goods abstracted or concealed, or bought, not at all in proportion to the degree of criminality of the act of receipt or concealment. Obviously there may be more guilt in concealing goods illegally imported, worth only one hundred dollars, than in receiving or concealing imported property

> worth ten times as much, but the statute measures the liability not by the guilt but by the value of the goods. It must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed, or purchased, instead of their single value. The act of abstracting goods illegally imported, receiving, concealing, or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity. There are many cases in which a party injured is allowed to recover in a civil action double or treble damages. Suits for infringement of patents are instances, and in some States a plaintiff recovers double damages for cutting timber upon his land. It will hardly be claimed that these are penal actions requiring the application of different rules of evidence from those that prevail in other actions for indemnity. * * *

The distinction between a criminal and a civil penalty was further clearly drawn in the *Stockwell* case in disposition of the contention that Section 2

of the Act of 1823 had been repealed by necessary implication by the Act of 1866, imposing criminal punishments. The Court said (p. 551):

> It is now insisted that the act of 1823 was in conflict with this act, or, if not, that it was supplied by it. Very clearly, however, this is not maintainable. The act of 1823 was, as we have seen, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States. The act of 1866 is strictly penal, not at all remedial. * * *

The *Stockwell* case seems to be directly applicable here and conclusive on the Government's contention: Section 146 (b) of the Revenue Act of 1928 and Section 4 of the Act of 1866 are both purely criminal; Section 293 (b) of the Revenue Act of 1928 and Section 2 of the Act of 1823 are both compensatory in nature and purely civil.

(4) *The fifty percent addition is in the nature of a special surtax imposed on the basis of fraud.* Fraud has constituted a basis of classification for separate treatment in Anglo-American civil law at least since the statute of 13 Eliz., c. 5 (1570), and the opinion of Lord Coke in *Twyne's Case,* 3 Co. Rep. 80b (1601), on fraudulent conveyances. See *Coder* v. *Arts,* 213 U. S. 223. It would seem too clear for dispute that fraud, which has thus served as a basis for separate classification in our law for so many centuries, may be used as a basis for a special surtax under the Sixteenth Amendment.

And here in substance Congress has imposed in Section 293 (b) a fifty percent surtax where the element of fraud is present. Special surtaxes are not novel in the income tax law. Many special provisions of a similar nature appear in the revenue laws for the purpose of preventing evasion and avoidance and for the protection of the revenue. For example, a special provision with respect to the use of corporations to prevent the imposition of surtaxes on stockholders has existed in the income tax since the Act of October 3, 1913 (c. 16, 38 Stat. 114, 166), Section II, A, 2.[a] This particular provision, in the statutory form in which it appears subsequent to the Revenue Act of 1918, imposes a special surtax and has been upheld by the courts. See, e. g., *United Business Corporation* v. *Commissioner*, 62 F. (2d) 754 (C. C. A. 2d), certiorari denied, 290 U. S. 635; *Williams Investment Co.* v. *United States*, 3 F. Supp. 225 (C. Cls.); *United States* v. *R. C. Tway Sales Co.*, 75 F. (2d) 336 (C. C. A. 6th). To deny to the Congress the power to impose a higher rate of tax here where fraud appears might cast doubt on the hitherto undoubted power of Congress to deal in an appropriate civil manner with other specific instances and types of tax evasion. In such situations it is certainly within the legitimate province of the Congress to

[a] The provision appears as Section 3 of the Revenue Act of 1916; Section 220 of the Revenue Acts of 1918, 1921, 1924, and 1926; Section 104 of the Revenue Acts of 1928 and 1932; Section 102 of the Revenue Acts of 1934 and 1936.

determine when a civil provision affords the requisite safeguard and when a criminal provision is necessary. See *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505, 510.

(5) *To hold Section 293 (b) punitive in nature would cast serious constitutional doubt upon the administrative application of that section as a civil safeguard for the protection of the revenue.* We respectfully submit that a holding to the effect that Section 293 (b) is punitive would not only overturn the legislative history and judicial and administrative construction of such legislation, but would create a grave constitutional uncertainty and embarrassment to the Government in the collection of the national revenue. If, as was held in the court below and assumed in the *Hanby* case, *supra*, the 50% addition is punitive, then both the power of the Commissioner to take action under Section 293 (b) and the jurisdiction of the Board of Tax Appeals to consider an addition to a deficiency under that section, may be seriously questioned on constitutional grounds.

In *Lipke* v. *Lederer*, 259 U. S. 557, it was held that the so-called taxes, retained in force and reimposed by Section 35 of the National Prohibition Act which prohibited, and made criminal, dealing in liquor, were in reality punitive penalties. Mr. Justice McReynolds, speaking for the Court, noted that (p. 562): "The guarantees of due process of law and trial by jury are not to be forgotten or

disregarded." The doubt as to the power of administrative officers to assess and collect a penalty truly punitive in nature is fortified by the observation in the dissenting opinion of Mr. Justice Brandeis (p. 564). The view that administrative officers may not have power to assess and collect truly punitive penalties is reiterated in *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386, 391–392.

The court below treated Section 293 (b) as punitive and refused to permit recovery of the fifty percent addition in this civil suit after *acquittal* in a prior criminal suit. In *United States* v. *La Franca*, 282 U. S. 568, 574, it is stated that a statute authorizing the collection of a punitive penalty by a suit civil in form following a criminal *conviction* would raise grave constitutional doubts. Thus it is doubtful whether the decision below leaves any field for the valid operation of Section 293 (b)*, apart from the possible suggestion that sections 146 (b) and 293 (b) must be regarded as alternative and mutually exclusive procedures. But even this suggestion is unavailing to save Section 293 (b) from the constitutional doubts just discussed, engendered by the decision below, whether the sec-

*As a practical matter if Section 293 (b) is held to be punitive in nature, it will be difficult, if not impossible, in many cases to collect the 50% addition even though there is no criminal proceeding under Section 146 (b) since the Government will be unable to call the taxpayer as a witness (*Lees* v. *United States*, 150 U. S. 476, 480), or compel him to produce his records and papers (*Boyd* v. *United States*, 116 U. S. 616; *United States* v. *Zucker*, 161 U. S. 475, 479–480).

tion be regarded as affording an alternative or a wholly independent remedy.

There is, and can be, no question upon the clear language of Section 293 (see p. 67 *infra*), that subsection (b) thereof is intended to be administratively applied. The question of construction here is whether Congress, nevertheless, intended the 50% addition under Section 293 (b) to be purely civil or punitive. To construe the section as punitive raises grave constitutional doubts under the *Lipke, Regal Drug Corp.,* and *La Franca* cases, as to the validity of legislation which has been enforced by administrative action and civil suit for almost three-quarters of a century. Decisions of this Court uniformly hold that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401;[5] *United States* v. *Standard Brewery,* 251 U. S. 210, 220; *Baender* v. *Barnett,* 255 U. S. 224, 226. Here it is not only possible to

[5] *United States* v. *Jin Fuey Moy,* cited in the text, is similar to the present case on the question of avoiding constitutional doubt by proper construction. There this Court construed the Harrison Drug Act as a revenue measure so as to avoid constitutional objection that Congress was exercising a police power within the respective States. Mr. Justice Holmes, who delivered the opinion of the Court, in affirming the same construction by the District Court, said (p. 402):

"It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the Dis-

avoid constitutional doubt by construing Section 293 (b) as a civil safeguard for the protection of the revenue, but indeed such construction is in accord with the administrative practice and compelled by judicial construction during the entire period.

The value of Section 293 (b) as a civil safeguard for the revenue cannot be overestimated. It compensates the Government for the added effort and expense of investigating and discovering fraud. It relieves honest taxpayers of an unjust burden. And the extent to which ordinary revenues are protected by this additional liability for fraud, while

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trict Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

The *Jin Fuey Moy* case presented a much more difficult situation for the application of the principle of avoiding constitutional doubt than does the present proceeding. There a certain proviso exempted the possession of drugs prescribed in good faith by a physician from the operation of a section making unlawful the possession of drugs by "any person not registered" with the collector of internal revenue. The Court recognized (p. 402) that the proviso was "a powerful argument taken by itself for a broader meaning" than raising and collection of revenue. But so important did the Court consider the avoidance of constitutional doubt, that it nevertheless concluded (p. 402):

"Even if for a moment the scope and intent of the act were lost sight of the proviso is not enough to overcome the dominant considerations that prevail in our mind."

Clearly the difficulties in the way of a construction avoiding constitutional doubts which were present in the *Jin Fuey Moy* case are not present here, and the holding of Section 293 (b) as a civil protection for the revenue should follow *a fortiori* from the *Jin Fuey Moy* decision.

immeasurable, must be great indeed. To hold that Section 293 (b) imposes added punishment for the crime defined by Section 146 (b) might well result in nullifying this essential civil safeguard. The Government would then be forced, as its sole protection for its revenue, to proceed by criminal indictment and trial in all fraud cases. It is apparent on the face of Section 293 that Congress did not intend that result.

(6) *The Coffey and La Franca decisions are not controlling here.*—The decision below that the additional tax here is barred by the prior acquittal resulted from the opinion of the court that such a holding was required by the decisions of this Court in the *Coffey* and *La Franca* cases, *supra*. We respectfully submit that neither of those cases requires such holding but that, on the contrary, both are consistent with the Government's position. In the *Coffey* and *La Franca* cases, criminal statutes were the basis of the proceeding and punishment was the objective.

The *Coffey* case was a proceeding *in rem* for the forfeiture of certain distilled spirits and other property of Coffey which were incident to the fraud practiced by Coffey in failing to pay a liquor tax on those spirits. Coffey filed a claim for the property and pleaded that he had been acquitted in a prior criminal proceeding for the same offenses, and under the same sections of the Revised Statutes, as were the basis for the *in rem* proceeding. To this plea the Government de-

murred. This Court in holding Coffey's plea good pointed out that, (a) both proceedings were criminal in nature, (b) both proceedings had the same objective, that is, punishment of Coffey; and (c) both proceedings were based in the main upon the same statutory sections.

The meaning of the *Coffey* case was clarified in *Stone* v. *United States*, 167 U. S. 178. There the defendant's prior acquittal on a criminal charge was held not to be a bar to a subsequent civil action by the United States. This Court said (at pp. 186–187):

> We are of opinion that the present case is not covered by the decision in *Coffey* v. *United States*. The judgment in that case was placed distinctly upon the ground that the facts ascertained in the criminal case, as between the United States and the claimant, could not be "again litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts." In the *Coffey case* there was no claim of the United States to property, except as the result of forfeiture. In support of its conclusion, the court referred to *United States* v. *McKee*, 4 Dill. 128, observing that the decision in that case was put on the ground "that the defendant could not be twice *punished* for the same crime, and that the former conviction and judgment was a bar to the suit *for the penalty*." [Italics as in original.]

The same distinction was again drawn in the *La Franca* case.

In *Boyd* v. *United States*, 116 U. S. 616, decided after the *Coffey* case and at the same term of Court, it was pointed out with regard to a forfeiture substantially the same as that involved in the *Coffey* case, that "If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment," (p. 634). The Government in the *Coffey* case, having failed to avail itself of a remedy which it might have had in its first proceeding against the defendant, was denied leave to seek that remedy in a second proceeding. Here, however, the addition to tax under Section 293 (b) could not have been imposed as a part of the punishment by the District Court upon a conviction under Section 146 (b).

The Court considered the forfeiture involved in the *Coffey* case as additional punishment for the crime. See *Boyd* v. *United States, supra*, at p. 634. Historically there is a clear and well defined distinction between forfeitures and additions to taxes. We have already set forth the origin and development of Section 293 (b) of the Revenue Act of 1928. We have seen that that provision had its origin in Section 14 of the Revenue Act of 1864. We have noticed similar provisions in the revenue laws of this country from an early date. These additions to tax are of American origin and have long been

deemed necessary and essential civil safeguards in our revenue structure. On the other hand, forfeitures have their origin in remote antiquity. The deodand is one type of forfeiture. 1 Tucker's Blackstone 301. A forfeiture such as was involved in the *Coffey* case bears some analogy to the law of deodand. See *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505, 510–511. It has from ancient times been considered a punishment for crime. 2 Blackstone, Commentaries (Christian, Chitty, etc., Ed., 1866) 308; 2 Tucker's Blackstone 267; see also *Various Items* v. *United States,* 282 U. S. 577, 580. Manifestly, there is no relation between forfeitures and additions to taxes. It is submitted that there is an obvious confusion in attempting to apply the principles governing forfeitures to civil safeguards such as additions to tax under Section 293 (b). It seems clear that this Court never intended the *Coffey* case to be so applied. See *Murphy* v. *United States,* 272 U. S. 630; *Lewis* v. *Frick,* 233 U. S. 291; *Stone* v. *United States,* 167 U. S. 178.

If, however, there does exist any doubt as to the meaning of the *Coffey* case, then, we submit, in view of the considerations herein set forth, that the doctrine of that case should be restricted to situations such as that there presented. That has been the apparent trend of decisions of this Court since the *Coffey* case. See *Murphy* v. *United States; Lewis* v. *Frick; Stone* v. *United States,* all *supra.* Indeed, it is doubtful under

the decision in *Various Items* v. *United States*, 282 U. S. 577, whether the *Coffey* case is still the law even in the general field of forfeitures.[6] In the *Various Items* case, a forfeiture was upheld even though there had been a prior conviction of the owners of the property for conspiracy based upon the same transactions as the forfeiture.[7] This Court ruled that the constitutional prohibition

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[6] The doubt of the court below as to the soundness of the *Coffey* case is indicated by the following language in its opinion (R. 448): "Though this rule seems hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility, it is implicit in the decision of *Coffey* v. *United States* which is binding on us in the absence of a modification by the Supreme Court". This doubt has been shared by other courts. Thus in *United States* v. *Gully*, 9 F. (2d) 959 (S. D. N. Y.), after an acquittal, Judge Learned Hand dismissed a libel for the forfeiture of a vessel upon the authority of the *Coffey* case, pointing out that it was not his place to decide whether that case was rightly decided; "That, of course, is a question which only the Supreme Court can reconsider" (p. 960). See also *People* v. *Rohrs*, 49 Hun. 150 [N. Y.]; *People* v. *Snyder*, 90 App. Div. 422 [N. Y.]; *People ex rel. Haffen B. Co.* v. *Clement*, 67 Misc. 527 [N. Y.], and *Micks* v. *Mason*, 145 Mich. 212. The doctrine of the *Coffey* case has been criticised and disapproved by text writers. Van Fleet on Former Adjudication, § 388; 1 Freeman on Judgments (5th ed.), § 319; see also 36 Col. L. Rev. 1007.

[7] The *Various Items* case differs in fact from the *Coffey* case in that the criminal prosecution involved in the *Coffey* case was for substantive offenses, whereas the criminal prosecution involved in the *Various Items* case was for conspiracy. However the *ratio decidendi* of the *Various Items* case does not permit of a distinction between the two cases based upon this difference. See *Various Items* v. *United States*, *supra*, at pp. 580–581. The basis of decision in the

against double jeopardy did not apply. The *Coffey* case was not cited. Despite the unmistakable trend of decisions of this Court to narrow the application of the *Coffey* case to the field of forfeitures, and indeed to confine it to the very situation there presented, the court below extended the application of that case to an entirely new and unrelated field.

In the *La Franca* case, this Court held that exactions there sought to be collected were not true taxes but penalties intended as punishment for infraction of law. The defendant having previously been convicted upon an information charging him with an offense under the same facts as were involved in the subsequent proceeding, the Court held that the second suit could not be maintained. It quoted from *United States* v. *Chouteau*, 102 U. S. 603, 611, where it was expressly stated that the penalty there involved, although recovered in a civil action "is still as a *punishment* for the

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Various Items case is summarized by the following paragraph from the opinion (p. 581):

"A forfeiture proceeding under R. S. 3257 or 3281 is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. *Origet* v. *United States*, 125 U. S. 240, 245–247. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply. *United States* v. *Three Copper Stills*, 47 Fed. 495, 499; *United States* v. *Olsen*, 57 Fed. 579, 582 *et seq.*; *Sanders* v. *Iowa*, 2 Iowa (Clarke ed.), 230, 278."

infraction of the law" and therefore "a former acquittal or conviction may be invoked to protect against a *second punishment* for the same offence." [Italics supplied.]

The suit held to be barred in the *La Franca* case was one by the Government to recover "taxes" and penalties alleged to be due under the National Prohibition Act from the defendant as a retail liquor dealer. Section 35 of that Act provided that *upon evidence of an illegal sale of liquor,* a tax should be assessed and collected "in double the amount now provided by law, with an additional penalty of $500 on retail dealers." This Court pointed out that in reality this was but to say that a person who made an illegal sale was liable for a "tax" in double the amount of the tax "imposed by pre-existing law for making a legal sale, which existing law renders it impossible to make"; and that a "penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"; and that such an exaction was a penalty "involving the idea of punishment for infraction of the law" (p. 572).

That the decision in the *La Franca* case was based squarely upon the ground that punishment was the purpose of the second proceeding is clear from the statement of this Court in *Various Items* v. *United States,*[*] *supra,* at p. 580:

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[*] The *Various Items* case was argued on the same day as the *La Franca* case, and the decisions in both cases were handed down on the same day by Mr. Justice Sutherland.

> In *United States* v. *La Franca, ante,* p. 568, we hold that, under Sec. 5 of the Willis-Campbell Act, a civil action to recover taxes, which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding *in rem* to forfeit property used in committing an offense.

This Court in the *La Franca* case (pp. 572–573) drew the distinction which is applicable here between this case and the *La Franca* and *Coffey* cases. It was pointed out that *Lipke* v. *Lederer,* and *Regal Drug Co.* v. *Wardell, supra,* settled the proposition that the exaction in the *La Franca* case was punishment for crime and hence barred by previous acquittal, whereas *United States* v. *One Ford Coupe,* 272 U. S. 321, and *Murphy* v. *United States, supra,* were inapplicable to the situation presented by the *La Franca* case since in those cases the object was not punishment. Here the 50 per cent addition is not punishment for crime as in the *La Franca, Lipke,* and *Regal Drug* cases, and hence is not barred by the previous acquittal.

There is nothing in either the *Coffey* or the *La Franca* case which indicates that the 50 per cent addition here involved is punitive. The court below stated (R. 448):

> The only rule necessarily derivable from *Coffey* v. *United States* would seem to be

> that an acquittal in a criminal prosecution is a bar to a civil action to enforce fines or forfeitures of property *which are in their nature criminal penalties.* [Italics supplied.]

It then considered the question whether the 50 per cent additional tax in the present case is punitive. The conclusion that the 50 per cent addition is punitive was based upon the language of this Court in the *La Franca* case, that the imposition of a tax "'in double the amount' provided by law 'upon evidence of an illegal sale'" of liquor, under the Act there considered, was a punitive penalty and would not be "'converted into a tax by the simple expedient of calling it such'" (R. 448). But the court's interpretation of the *La Franca* case completely overlooks the fundamental difference between the nature of the so-called tax in the *La Franca* case, which had no relation to the ordinary support of the Government, but was solely "imposed by statute as *punishment* for an unlawful act" (p. 572), and the additional tax in the present case. Here the 50 per cent addition is a part of the deficiency and part of the tax. It is levied by Congress under its power to levy and collect taxes. The statute under which the addition is asserted is strictly a taxing statute executed solely to provide revenue and not to punish for criminal violations of a regulatory statute. The exactions in the *La Franca* case were

criminal penalties since they could be enforced only if a crime had been committed in violation of the regulatory National Prohibition Act. In the *La Franca* case the penalty and criminal provisions were closely interwoven. But the two provisions here involved appear in separate and independent sections. And the addition to the deficiency may be incurred without the criminal offense being committed and *vice versa*. For it is settled that the issue of fraud under Section 293 (b) is not an issue under Section 146 (b). *United States* v. *Scharton*, 285 U. S. 518, discussed in detail, *infra*, p. 60; see *United States* v. *Clayton-Kennedy*, 2 F. Supp. 233, 239 (Md.).

In conclusion, we submit that the addition to the tax imposed by Section 293 (b) is not imposed as punishment for crime; that the rules relating to double jeopardy have no application; and that consequently the respondent's acquittal in the criminal case does not constitute a bar here. The decision of the court below on the point here involved was not required by prior decisions of this Court, but on the contrary conflicts with the long line of judicial decisions to which we have referred; is contrary to the congressional intent and the administrative practice which has existed for many years; and endangers a necessary and essential civil safeguard for the protection of the Government's revenues.

II

THE ISSUE OF FRAUD INVOLVED UNDER SECTION 293 (B) IS NOT RES JUDICATA BY REASON OF THE PRIOR INDICTMENT, TRIAL, AND ACQUITTAL OF THE RESPONDENT IN A CRIMINAL PROCEEDING

Whether a second proceeding even though civil in form involves double jeopardy depends upon whether its objective is punishment. (See Point I, *supra.*) As stated by this Court in *Murphy* v. *United States, supra,* that it imposed "punishment is the only ground on which the former judgment would be a bar" (p. 632). That is the determining factor, no matter whether the first proceeding resulted in acquittal or conviction. Whether a second proceeding on an issue therein is *res judicata,* however, depends upon wholly different considerations, including the outcome of the first proceeding. It is clear, for example, that if the criminal proceeding had resulted in a conviction of respondent, no defense of *res judicata* could have been raised herein on his behalf. Moreover, differences in degrees of proof required in the two proceedings are immaterial to the application of *double jeopardy.* But, as we will show, it is well settled that an acquittal in a criminal proceeding can not be *res judicata* in a subsequent civil proceeding, because of the difference between the two proceedings in the degree of proof required.

However, the court below failed in its opinion to distinguish between the two doctrines, and it is not clear whether the holding that the 50% addition

was barred was based on *res judicata* or double jeopardy. The court's statement that the rule in the *Coffey* case was "hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility" (R. 448), would indicate that the decision below was based on *res judicata*. Yet, so far as the application of the doctrine of *res judicata* is concerned, the decision of the court below that the 50% addition was barred is inconsistent with its holding allowing the ordinary deficiency. The court held that a determination of fraud under Section 276 (a) of the Revenue Act of 1928 was not precluded by the prior acquittal.[9] That holding was clearly correct, and it may be noted that respondent's petition for certiorari from that holding, in which respondent relied on the *Coffey* case as requiring a contrary result, was denied (No. 307, October Term, 1937). But the doctrine of *res judicata* appears equally inoperative to preclude the determination of fraud under Section 293 (b).

Res judicata is essentially a doctrine of repose aimed against relitigation of a matter which has passed into judgment. See *United States* v. *Leffler*, 11 Pet. 86, 100. There are two branches of the doctrine. First, a subsequent proceeding upon the same claim or demand which has passed into judg-

[9] In the absence of such a determination, the deficiency here would have been barred by the general two-year statute of limitations. Section 275 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 858.

ment in a prior proceeding is not maintainable. Second, a proceeding between the same parties on a claim or demand different from that involved in a prior proceeding is precluded only as to the precise issue or issues adjudicated in the prior proceeding. See *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 623; *Packet Co.* v. *Sickles*, 24 How. 333, 341–342; *Duchess of Kingston's* Case, 20 How. St. Trials 537 (1776). The two branches of the doctrine are concisely stated in the *Tait* case (p. 623):

> The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352, 353; *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48; *United States* v. *Moser*, 266 U. S. 236, 241.

Thus the application of the doctrine of *res judicata* to a given case depends upon the existence of a plurality of matters in combination, and the burden is upon the person relying on the prior judgment to establish the existence of the necessary elements. Bower, *The Doctrine of Res Adjudicata*, 9.

The present proceeding is clearly not for the same claim or demand as that adjudicated in the criminal suit against respondent, and the first branch of the doctrine is inapplicable here. Cf. *Tait* v. *Western Md. Ry. Co., supra.*

We submit that neither the application of the second branch of the doctrine, which requires an identical issue in the two proceedings, nor any other application of the doctrine of *res judicata,* is warranted here because (1) *res judicata* is inapplicable to a civil proceeding following an acquittal in a prior criminal prosecution since there is a vital difference in the quantum of proof required; (2) the nature and consequences of the two proceedings are entirely dissimilar; (3) the issue in the present proceeding is different from that litigated in the criminal prosecution; and (4) the doctrine of *res judicata* should not be applied to deprive the Government of an important civil safeguard provided by Congress for the protection of the revenue.

(1) *The doctrine of res judicata is inapplicable to a civil proceeding following an acquital in a prior criminal prosecution.* All that was adjudicated by the acquital in the criminal case was that the respondent had not been proved guilty beyond a reasonable doubt of doing the criminal acts there charged against him. *Murphy* v. *United States,* 272 U. S. 630, 633; *Lewis* v. *Frick,* 233 U. S. 291, 302; *Stone* v. *United States,* 167 U. S. 178, 196;

Chantangco v. *Abaroa,* 218 U. S. 476, 483; *United States* v. *Warner Bros. Pictures,* 13 F. Supp. 614 (E. D. Mo.); *United States* v. *Donaldson-Shultz Co.,* 148 Fed. 581 (C. C. A. 4th). The Government is, of course, precluded from thereafter disputing the correctness of the result in the criminal case. But it does not follow that petitioner is precluded from asserting a claim for the additional tax against the respondent. The acquittal in the criminal case is no bar to the assertion of this civil claim. See 2 Black, Judgments, Section 529; 1 Greenleaf on Evidence (16th Ed.), Section 537; Taylor on Evidence, Section 1693; Everest & Strode, Law of Estoppel (2d Ed.) 140; and 11 L. R. A. (N. S.) 653, 655.

This is so because the quantum of proof required in a criminal prosecution is different from that required here. In the criminal prosecution the Government failed to prove the charge beyond a reasonable doubt. But here, while the evidence of fraud was required to be clear and convincing, proof of fraud beyond a reasonable doubt was not necessary. See *Oriel* v. *Russell,* 278 U. S. 358, 364–365; *United States* v. *Regan,* 232 U. S. 37, 46–48.

In *Lewis* v. *Frick, supra,* an alien was ordered deported for bringing a woman into this country for immoral purposes. He filed a petition for a writ of *habeas corpus* on the ground that the issue in the deportation proceeding was *res judicata* by

reason of his acquittal of the same charge in a prior criminal proceeding. The writ was denied. This Court, in affirming the denial of the writ, held that the acquittal did not render the subsequent proceeding *res judicata*. After stating that the issues were not identical, the Court went on to say (p. 302):

> And, besides, the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused. * * *

In *Stone* v. *United States, supra,* this Court, after distinguishing the *Coffey* case, said (at p. 188):

> In the criminal case his acquittal may have been due to the fact that the Government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offence charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the Government to a verdict. * * *

In *Murphy* v. *United States, supra,* the defendants were acquitted of the criminal charge of maintaining a nuisance in violation of the National Prohibition law. Subsequently, an action was brought in equity under the provisions of another section of the same law to abate the same nuisance.

The defendants pleaded their former acquittal and relied on the *Coffey* case. Mr. Justice Holmes, speaking for the Court, referred to the contention as being "plausible but unsound," and said (at pp. 632–633):

> That it did impose a punishment is the only ground on which the former judgment would be a bar. For although the parties to the two cases are the same, the judgment in the criminal case does not make the issues in the present one *res judicata,* as is sufficiently explained in *Stone* v. *United States,* 167 U. S. 178, and *Chantangco* v. *Abaroa,* 218 U. S. 476. The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place. * * *

This Court then referred with approval to the "carefully considered" case of *State* v. *Roach,* 83 Kans. 606. In that case the Supreme Court of Kansas said (at pp. 611–612):

> What a verdict of not guilty really decides is that the evidence does not exclude every reasonable doubt of the defendant's guilt. If in the present case the injunction action had been tried first it would hardly be seriously contended that a judgment for the plaintiff would bar a defense in the criminal action. A sufficient reason why the defendant would not be concluded by the result in the civil case is that his guilt would not have been established beyond a reasonable doubt. * * *

In *United States* v. *Warner Bros. Pictures, supra,* the defendants were acquitted in a criminal case of the charge of violating the Sherman Act. Thereafter, the United States began a suit in equity against them for an injunction alleging the same conspiracy charged in the previous criminal proceeding but covering an additional period of about seven months. In denying the defendants' motion to dismiss upon the ground that the issue presented was *res judicata,* the court said (at p. 616):

> The cases of *Stone* v. *United States,* 167 U. S. 178, 17 S. Ct. 778, 42 L. Ed. 127; *Lewis* v. *Frick,* 233 U. S. 291, 34 S. Ct. 488, 58 L. Ed. 967; and *Chantangco* v. *Abaroa,* 218 U. S. 476, 31 S. Ct. 34, 54 L. Ed. 1116, clearly establish the doctrine that an acquittal on a criminal charge is not a bar to a civil action instituted by the government and arising out of the same facts on which the criminal action was based.

To the same effect is *United States* v. *Schneider,* 35 Fed. 107 (C. C. Ore.).[10] That was a civil action

[10] This rule, that an acquittal in a criminal proceeding is not *res judicata* in a civil proceeding because of the difference in quantum of proof, is followed by state courts [*Cowdery* v. *State,* 71 Kans. 450; *Myers* v. *Maryland Casualty Co.,* 123 Mo. App. 682; *Riker* v. *Hooper,* 35 Vt. 457; *State* v. *Sargood,* 80 Vt. 415; *State* v. *Weil,* 83 S. C. 478; *Busby* v. *State,* 51 Tex. Crim. Rep. 289; *Schindler* v. *Royal Ins. Co.,* 258 N. Y. 310; *People ex rel. Haffen B. Co.* v. *Clement,* 67 Misc. 527 (N. Y.)]; and by text writers [2 Freeman on Judgments (5th Ed.) 1384].

to recover taxes alleged to be due from the defendant as a wholesale dealer in malt liquor. The defendant entered a plea of *res judicata* claiming that he had been acquitted in a criminal action to recover a penalty for the non-payment of the same taxes. The Government's demurrer to the plea was sustained. After referring to 1 Wharton on Evidence, Section 776, and 1 Greenleaf on Evidence (16th Ed.), Section 537, the court said (at p. 109):

> * * * it may be that the same jury, on the same evidence, acting on this rule, would find the defendant was a dealer in malt liquors, as alleged in this civil action, and refuse to do so in a criminal one. Therefore the United States is not estopped, by the verdict in the criminal action, to allege and prove in this one that the defendant was a wholesale dealer in malt liquors.

The *Coffey* case is not an authority to the contrary. That decision was based upon the constitutional safeguard against double jeopardy rather than *res judicata*. It was urged in argument in that case that because of the difference in the required quantum of proof between the criminal prosecution and the subsequent civil proceeding to forfeit the property of Coffey, the latter proceeding was not barred. This contention was dismissed by the Court upon the ground that the object of the second proceeding was to inflict punishment on Coffey for the criminal acts of which he had

been acquitted. Difference in degree of proof is immaterial on a question of double jeopardy. The fact that the second proceeding is punitive is immaterial on a question of *res judicata.* Thus the decision in the *Coffey* case appears to relate only to the field of double jeopardy. If broad language in the opinion in the *Coffey* case was once susceptible of the interpretation that the decision was one on *res judicata,* that possible ambiguity has since been entirely removed. The *Coffey* case has been discussed by this Court and its doctrine has been carefully delimited as meaning that facts ascertained in a criminal case, as between the United States and the defendant, may not be "again litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts." (Italics as in original.) *Stone* v. *United States, supra,* at p. 186; *Chantangco* v. *Abaroa,* 218 U. S. 476, 481–2; *Murphy* v. *United States, supra,* at pp. 632–3; see also the *Coffey* case at pp. 444–5, and *Boyd* v. *United States,* 116 U. S. 616, 634. The contention that the *Coffey* case is applicable in the field of *res judicata* was definitely rejected by this Court in the subsequent case of *Murphy* v. *United States, supra,* at pp. 632–633; see also *Lewis* v. *Frick, supra.*

(2) *The difference in the nature and consequences of the two proceedings further emphasizes the inapplicability of the doctrine of res judicata to this proceeding.* No part of the deficiency,

whether ordinary tax or the fifty per centum addition thereto, could have been collected or imposed in the criminal proceeding. In this respect the instant case differs materially from the *Coffey* case, which was an action *in rem* to enforce a forfeiture provided for in the criminal statute and which could have been imposed as a part of a judgment of conviction in the criminal case. As has been pointed out above (p. 38), this fact was indicated in *Boyd* v. *United States*, 116 U. S. 616, 634. Since the addition to the deficiency (and, for that matter, the ordinary item of the deficiency) could not have been asserted or imposed in the criminal case, the verdict of acquittal cannot operate to bar the addition. The case of *Ash Sheep Co.* v. *United States*, 252 U. S. 159, makes this conclusion abundantly clear. There the Government had sought an injunction and statutory penalties in a suit in equity. The Court gave nominal damages but refused to award the statutory penalty on the ground that equity would not aid in the enforcement of a penalty of the nature there involved. Subsequently this action at law was brought to collect the penalty. The defendant asserted that the matter was *res judicata*. On this point the Court said (at p. 170):

> Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the Court of

> Appeals that "a judgment is not conclusive on any question which, from the nature of the case or the form of the action, could not have been adjudicated in the case in which it was rendered."

Without mutuality of estoppel there can be no application of the doctrine of *res judicata*. In *Chantangco* v. *Abaroa*, 218 U. S. 476, the Court said (at p. 481):

> The requisite of mutual estoppel is essential to make a judgment in one action obligatory in another, although the point in issue is the same in each case. * * *

To prevent the rule from working injustice it is essential that its operation be mutual. *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362; *Schindler* v. *Royal Ins. Co., supra; People* v. *Rohrs*, 49 Hun. 150 (N. Y.). If the present case had been tried first, an adjudication in it against the respondent certainly would not have established his guilt in the criminal proceeding. "The consideration that protects him against the plea of *res judicata* in the one case deprives him of its benefits in the other." *State* v. *Roach, supra,* at p. 612.

The consequences of a criminal prosecution under Section 146 (b) are, of course, criminal. Such a prosecution is for "the highest form of crime against the revenue laws." *United States* v. *Miro*, 60 F. (2d) 58, 60 (C. C. A. 2d). In case of conviction the result is a fine, or imprisonment, or both. The object of seeking to collect the deficiency

herein, including the fifty per centum addition thereto, is to provide public revenue. The addition is imposed by the statute upon the determination of the fact of fraud found by the Commissioner. The determination of that fact and the collection of the tax are administrative in function. These vital differences further demonstrate the inapplicability of the doctrine of *res judicata* to the present case.

(3) *The issue in the present proceeding in respect to the fifty per centum addition to the deficiency is different from the issue litigated in the criminal proceeding.* The respondent must establish that the issue litigated in this proceeding was determined in his favor in the criminal action. *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 623. As in the civil law it is essential to show not only *eadem res* but also *eadem quaestio*. Bower, The Doctrine of Res Judicata 115.

In order to make the former judgment *res judicata,* the respondent pleads that the issues are "identical" (R. 13). In the tribunals below he sought to establish this by referring to certain extracts from the court's charge and certain parallels in the facts. He relied upon the fact that much of the evidence introduced before the Board of Tax Appeals was from a stipulation referring to testimony and exhibits introduced in the criminal trial. This, of course, is not disputed. However, it is worthy of note that certain important evidence

was introduced before the Board of Tax Appeals which was not presented to the court in the criminal trial. This included convincing evidence from two witnesses that the respondent stated in January 1930, that he had not sold the 18,300 shares of stock (R. 299, 301); that the respondent was not above false swearing in connection with personal property tax (R. 183; YYY, R. 430–432); and, as indicated by a reading of his testimony (R. 146 *et seq.*), numerous contradictory and evasive statements furnished by the respondent himself.

But the test is not whether the evidence was the same in the two proceedings but whether the issue was identical. Even if the facts presented in this proceeding were identical with those adduced at the criminal trial, that would not establish identity of issues. *Stone* v. *United States,* 167 U. S. 178. In *Lewis* v. *Frick,* 233 U. S. 291, the facts in the subsequent civil proceeding to deport an alien were apparently the same as those presented in the criminal trial. In *United States* v. *Donaldson-Shultz Co.,* 148 Fed. 581 (C. C. A. 4th); and *United States* v. *Warner Bros. Pictures,* 13 F. Supp. 614 (E. D. Mo.), the facts on which the injunctions were granted were the same as those presented in the criminal trials which had resulted in acquittals. The facts offered in evidence to establish the matters in issue are not themselves the issue. The issue is framed by the allegations in the complaint which the opposing party controverts by

his pleading. *Reynolds* v. *Stockton,* 140 U. S. 254, 270–271.

The criminal action was based upon Section 146 (b), which is directed against "any person who *willfully attempts* in any manner to *evade or defeat any tax imposed* by" the income tax title of the revenue Act, or the payment thereof. [Italics supplied.] In contrast to this, Section 293 (b), which imposes the addition to the deficiency contested by the respondent in this case, applies "if any part of any deficiency is due to *fraud* with intent to evade tax." [11] [Italics supplied.] Comparison of the two statutes demonstrates that the issue of fraud which is involved under Section 293 (b) is not an issue in a criminal prosecution under Section 146 (b). *United States* v. *Scharton,* 285 U. S. 518. See also *United States* v. *Troy,* 293 U. S. 58; *Castle* v. *United States,* 17 F. Supp. 515 (C. Cls.). In the *Scharton* case the taxpayer was indicted under Section 1114 (b) of the Revenue Act of 1926, which is substantially identical with Section 146 (b) of the Revenue Act of 1928. Scharton moved to quash the indictment because the offenses were committed more than three years prior to the return of the true bill. Section 1110 (a) of the 1926 Act provided a three-year statute of limitations, except for offenses involving the de-

[11] Observe that "wilfulness", which is an element of the crime denounced by Section 146 (b), is not included in Section 293 (b). Cf. *United States* v. *Murdock,* 290 U. S. 389.

frauding or attempting to defraud the United States, or any agency thereof, in any manner where the period of limitation was fixed at six years. The question was thus squarely presented as to whether the element of fraud was a part of the charge. The indictment was quashed on the ground "that the offense defined by use of the words 'evade or defeat' does not involve defrauding or attempting to defraud within the intent of the proviso" (p. 520). On appeal, the Government urged that "fraud is implicit in the concept of evading or defeating" and that "any effort to defeat or evade a tax is said to be tantamount to and to possess every element of an attempt to defraud the taxing body" (pp. 520–521). But this Court affirmed and held that the three-year statute of limitations applied because under Section 1114 (b) of the 1926 Act an averment of fraud in the indictment was surplusage, "for it would be sufficient to plead and prove a wilful attempt to evade or defeat" (p. 521). The *Scharton* case thus squarely holds that the element of fraud is not an issue in a prosecution under Section 146 (b) of the 1928 Act.[12] This holding when applied to this case, defeats the respondent's contention that the issue of fraud involved in this

[12] After Scharton's indictment was quashed he sought to escape the payment of the tax upon that ground. The Board of Tax Appeals decided against him in *Scharton* v. *Commissioner*, 32 B. T. A. 459, saying (at p. 464):

"Even if the quashing of the indictment in the criminal proceeding might be said to be a judgment of acquittal, it is not *res judicata* in this proceeding. It is not even admis-

suit for the fifty per centum addition to the deficiency is *res judicata,* for that issue was not present in the criminal case.

(4) *The doctrine of res judicata should not be applied to deprive the Government of an important civil safeguard provided by Congress for the protection of the revenue.* As urged throughout this brief, Sections 146 (b) and 293 (b) are in no way mutually dependent. They appear in different parts of the Revenue Act and under different headings. Section 146 (b) invokes the judicial processes of a criminal proceeding. Section 293 (b) comes into play only when the administrative machinery of determining and asserting a deficiency is in operation. One is clearly criminal; the other is clearly civil and intended by Congress as a civil safeguard.

Res judicata is a doctrine of the common law. It rests on no constitutional prohibition, but serves as a part of the adjective law for the purpose of repose. Such purpose has never been held to include a prohibition against maintaining a nonpunitive civil proceeding after a criminal prosecution. Here the intent of Congress in providing Section 293 (b) as a civil safeguard independent of the criminal Section 146 (b) is persuasive in determining that the doctrine of *res*

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sible as evidence of the truth or falsity of the facts decided in the prior proceeding. See *Coffey* v. *United States*, 116 U. S. 436; *Stone* v. *United States*, 167 U. S. 178; 34 Corpus Juris 971; 15 Ruling Case Law 1000–1003, and cases cited."

judicata is not applicable to the present proceeding. Cf. *Sourino* v. *United States,* 86 F. (2) 309, 311 (C. C. A. 5th), certiorari denied, 300 U. S. 661.

To apply the doctrine of *res judicata* in this case would mean that the Government must henceforth elect between the civil and the criminal proceeding, and when one course is chosen the other is thereby closed. In the court below the respondent insisted that the Government took that gamble and lost. Clearly it is not the law, and the Congress never intended that it should be the law, that the right of the Government to collect its revenue is to be determined by the technique of the gaming table. In *United States* v. *Donaldson-Shultz Co.,* 148 Fed. 581, 585 (C. C. A. 4th), the court said (at p. 585):

> It is argued by the appellee that because the United States proceeded first by indictment, and upon the trial there was verdict of acquittal, that conditions must remain in statu quo, and that the government has no further right to proceed in a civil action to remove an obstruction to a navigable stream which it is alleged still exists. If this be the law, then the right of the government to maintain the navigable waters in a condition suitable for navigation and free from obstruction would, in many cases, be absolutely destroyed by the vicissitudes, the uncertainties, and the local environments attending criminal trials. An obstruction might exist and yet the evidence adduced in a criminal

> trial might not be sufficient in the minds of the jury to convince them beyond what the law calls a reasonable doubt, which is necessary in such trials in order to authorize a verdict of guilty. * * *

Similarly, the Government's right to collect its revenue should not be subjected to the uncertainties of a criminal prosecution. In spite of the difficulties of obtaining a conviction for tax evasion, in certain cases it is of the utmost importance that the Government first proceed by criminal prosecution. Public policy demands that the Government should be free to proceed by criminal action without forfeiting its right to the collection of any additional taxes which may be found to be due.

CONCLUSION

That portion of the judgment of the court below relating to the fifty per centum addition to the tax imposed under Section 293 (b) of the Revenue Act of 1928 is clearly erroneous and should be reversed.

Respectfully submitted.

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DECEMBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 146. PENALTIES.

(a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a

partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SUPPLEMENT M—INTEREST AND ADDITIONS TO THE TAX

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after

the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Revised Statutes:

SEC. 3176 [as re-enaccted by Section 1103 of the Revenue Act of 1926].

If any person, corporation, company, or association fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner of Internal Revenue may, from his own knowledge and from such information as he can obtain through testi-

mony or otherwise, make a return or amend any return made by a collector or deputy collector. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

If the failure to file a return (other than a return under Title II of the Revenue Act of 1924 or Title II of the Revenue Act of 1926) or a list is due to sickness or absence, the collector may allow such further time, not exceeding 30 days, for making and filing the return or list as he deems proper.

The Commissioner of Internal Revenue shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax. (U. S. C., Title 26, Secs. 1512, 1524.)

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 791. *Penalties.*—The penalties provided for in section 146 can not be assessed but are enforceable only by suit or prosecution. * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

CHARLES E. MITCHELL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

WILLIAM WALLACE,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

CHARLES E. MITCHELL.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

This petition of the Commissioner of Internal Revenue for a writ of Certiorari is a cross-petition to the petition (No. 307) of respondent, Charles E. Mitchell, now before this Court.

The Commissioner seeks a review of the ruling of the Circuit Court of Appeals (R. 819-828) that respondent's acquittal on a criminal prosecution on the charge of fraudulently attempting to evade taxation bars the Commissioner from later assessing under Section 293 (a) of the Revenue Act of 1928, a 50 per cent addition to the tax deficiency by reason of "fraud with intent to evade tax". He urges that Section 293 (b) of the Revenue Act of 1928 is not criminal

or punitive in nature and that the 50 per cent "additional tax" as for fraud may be assessed against respondent even though a jury in a criminal prosecution had found respondent not guilty of fraud with intent to evade tax in the very transactions upon which this additional assessment was based.

Reasons for Denying the Writ.

I.

Petitioner urges that the constitutional principles announced by this Court in *United States* v. *La Franca,* 282 U. S. 568; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386; *Lipke* v. *Lederer,* 259 U. S. 557; and *Coffey* v. *United States,* 116 U. S. 427, either have no application to this case or should be overruled if constituting a bar to the assessment of penalties against respondent. Respondent insists that these contentions are without merit.

It is well settled that the assessment of a penalty because of a fraudulent attempt to evade tax is punitive, and that a person cannot be so assessed as a penalty for certain acts if he has previously been in jeopardy in a criminal prosecution based on the same acts.

Coffey v. *United States,* 116 U. S. 427, is a leading case upholding this statement of the law. For a detailed discussion of this case, reference is made to respondent's petition for a writ of certiorari (No. 307) and supporting brief now before this Court. This case announces as a fundamental principle of our constitutional law that a person, once in jeopardy on a criminal prosecution, may not later, in another proceeding, whether criminal or civil, be punished for the acts of which he was previously acquitted or convicted.

In *United States* v. *La Franca,* 282 U. S. 568, the respondent had been convicted of violating the National Prohibition Act. In addition to the penalty thereby imposed on him,

he was assessed, under Section 35 of the Act, with a tax in double the amount provided by law. In ruling against the additional penalty, this Court clearly distinguished between a "tax" and a "penalty" as follows (p. 572):

> "A tax is an enforced contribution to provide for the support of Government; a penalty as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or thing; and if an exaction be clearly a penalty, it cannot be converted into a tax by the simple expedient of calling it such."

Before deciding that the respondent had previously been in jeopardy and could not again be punished for the same offence, this Court propounded the following question (p. 573), which, in view of the negative answer given and the aforesaid distinction between a "tax" and a "penalty", gives the rationale of the case and is decisive of the instant case:

> "Respondent already had been convicted and punished in a criminal prosecution for the identical transaction set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action under the circumstances here disclosed, alter the rule?"

This Court, in *Lipke* v. *Lederer*, 259 U. S. 557, 561-2, drew the following distinction between a tax and a penalty:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. *Child Labor Tax* case, *ante*, 20. When by its very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States*, 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment

> under § 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix*, 233 U. S. 318, 324."

This distinction between a tax and a penalty is applicable to the instant case even though the *Lipke* case was a decision under the National Prohibition Act, an act designed to prohibit certain acts declared to be unlawful. In the instant case, the penalty could only have been assessed upon a determination that respondent had committed certain criminal acts—each involving a fraudulent attempt to evade tax with respect to which he had been in jeopardy on the earlier criminal trial. This "clearly involves the idea of punishment for infraction of the law."

There are certain cases apparently holding that it is unconstitutional to assess an additional tax as penalty for violation of a taxing statute in any manner other than by indictment and jury trial. *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386; *Hanby* v. *Commissioner of Internal Revenue*, 67 F. (2d) 125. However, in the instant case it matters not whether the penalty was assessed in a civil or criminal proceeding, as the assessment could only have been made if respondent had not previously been placed in jeopardy by criminal prosecution on the same issue of fact. *United States* v. *La Franca, supra.* In this connection see *United States* v. *Chouteau*, 102 U. S. 603, wherein this Court said (p. 611):

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. *The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prose-*

> *cution.* The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction my be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless." (Italics ours.)

II.

The cases relied upon by petitioner are not in point.

In support of his contention that the Circuit Court of Appeals erred in eliminating the penalties, petitioner relies upon the following cases:

McDowell v. *Heiner,* 15 F. (2d) 1015 (C. C. A. 3) (adopting the opinion of the District Court, 9 F. (2d) 120 (W. D. Pa.)), certiorari denied, 273 U. S. 759;
Murphy v. *United States,* 272 U. S. 630;
Lewis v. *Frick,* 233 U. S. 291;
Passavant v. *United States,* 148 U. S. 214;
Dorsheimer v. *United States,* 7 Wall. 166; and
Bartlett v. *Kane,* 16 How. 263.

These cases relate to the mode of procedure for the assessment of the penalty. They do not affect the doctrine of *Coffey* v. *United States,* 116 U. S. 436, and the cases referred to under Point I.

In *McDowell* v. *Heiner,* 15 F. (2d) 1015 (affirming 9 F. (2d) 120, certiorari denied, 273 U. S. 759), relied upon by petitioner, the only opinion was that written by the District Court. There the taxpayer opposed the assessment of penalties upon the ground that he had not been indicted and tried by a jury. The Court rejected this contention and

held that a penalty for an attempt to evade tax may be enforced by civil suit or by action of administrative officers, "although such facts may constitute a crime." The court also clearly stated in the following language (p. 122) that it viewed the assessment of an additional tax as a punishment for the crime of fraudulently attempting to evade tax:

> "* * * Willful fraud, with intent to evade payment, has been made a misdemeanor with appropriate punishment. But this does not limit the power of Congress to *punish* the delinquent taxpayer by increasing the amount of the tax by *ad valorem* additions." (Italics ours.)

There was no discussion in that case of *res judicata* or double jeopardy and the decision has no bearing upon the instant case except in so far as it states that the assessment of additional taxes is a means of punishing infractions of the tax laws, which coincides with respondent's contention that the assessment of tax penalties against him is an attempt to punish him for alleged criminal acts of which he has been acquitted by a jury in a criminal prosecution.

In *Dorsheimer* v. *United States*, 7 Wall. 166, this Court apparently held that penalties for tax evasion might be assessed and collected by administrative officers. However, the Court stated that the penalty was a punishment for a fraudulent act and served to deter others from committing similar acts.

In *Bartlett* v. *Kane*, 16 How. 263, this Court held that a penalty for undervaluation of goods imported into the country might be assessed by administrative officials without criminal proceedings against the alleged offender, and that the value fixed by customs appraisers was conclusive in the absence of fraud. The Court stated that such procedure was necessary in order to expedite the collection of custom duties. To the same effect is the decision of this Court in *Passavant* v. *United States*, 148 U. S. 214.

Murphy v. *United States,* 272 U. S. 630, is not in point. There, this Court sustained the power of an equity court, subsequent to defendant's acquittal of a violation of the National Prohibition Act, to abate a nuisance declared to be such by Sec. 22 of the Act. The decision was placed upon the ground that

> "the decree in the present case did not impose a punishment for the crime from which the appellants were acquitted by the former judgment. *That it did impose a punishment is the only ground on which the former judgment would be a bar.* * * * The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place." (Italics ours.)

Furthermore, the court said:

> "It appears to us that the purpose is preventive, not a second punishment that could not be inflicted after acquittal from the first."

Likewise, in *Lewis* v. *Frick,* 233 U. S. 291, in sustaining a deportation order after the defendant had been acquitted of a criminal charge, this Court concluded that "*the issue* presented by the traverse of the indictment *was not identical* with the matter determined by the Secretary of Commerce and Labor". (Italics ours.)

Conclusion.

1. The authorities relied upon by Petitioner do not sustain his contention. Rather they bear out the contention of respondent that the additional tax sought to be imposed is a penalty for an alleged fraudulent attempt to evade tax.

2. On the authority of *Coffey* v. *United States, United States* v. *La Franca,* and *United States* v. *Chouteau, supra,* petitioner is foreclosed from assessing additional taxes as

penalties against respondent by reason of respondent's acquittal in a criminal prosecution based on the identical acts on which petitioner now seeks to make the assessment. This is true even though this is a civil proceeding. *United States* v. *La Franca, supra; United States* v. *Chouteau, supra.*

3. The additional tax assessment which petitioner seeks to impose on respondent is a punishment for an alleged crime of which respondent has been acquitted and as such, violative of the Fifth Amendment. The taxing statutes should be applied and construed so as to avoid this unconstitutional result. *United States* v. *Standard Brewery,* 251 U. S. 210; *Baender* v. *Barnett,* 255 U. S. 224.

WHEREFORE it is respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM WALLACE,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

CHARLES E. MITCHELL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT MITCHELL

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Dated, January , 1938.

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IN THE

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OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

CHARLES E. MITCHELL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT MITCHELL

Opinions Below

The opinion of the Board of Tax Appeals (R. 79-107) is reported in 32 B. T. A. 1093. The opinion of the Circuit Court of Appeals (R. 442-449) is reported in 89 F. (2d) 873.

Jurisdiction

The judgment of the Court of Appeals was entered on May 17, 1937 (R. 449). The petition for a writ of certiorari was filed August 17, 1937 (R. 450), and granted October 11,

1937 (R. 449). The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

On April 25, 1933 an indictment was returned against respondent by a grand jury of the District Court of the United States for the Southern District of New York. The first count (the only count here involved) charged that respondent

> "unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to-wit, $728,709.84, upon his net income for 1929" (R. 78-79).

The item of $728,709.84 in the indictment is identical with the tax deficiency asserted in this case by petitioner for the year 1929, to which petitioner added $364,354.92 as a fifty per centum fraud penalty (R. 78-79). Does respondent's acquittal bar petitioner from imposing and collecting that fifty per centum addition to the tax deficiency under Section 293(b) of the Revenue Act of 1928?

Statutes and Regulations Involved

Petitioner's brief adequately sets forth the statutes and regulations involved, with the exception of those prescribing the method of assessing and collecting tax deficiencies and penalties. (See Appendix hereof.)

Statement

Petitioner's brief presents a fair statement of the pertinent facts.

The Specification of Errors

Since the Court below did not hold all of Section 293(b) criminal in nature, but only that portion thereof which imposed a fifty per centum addition to the tax, paragraph 2 of petitioner's specification of errors is too broad (Pet. Br. 5).

SUMMARY OF ARGUMENT

I

The fifty per centum fraud penalty of $364,354.92 imposed by petitioner upon respondent pursuant to Section 293(b) of the Revenue Act of 1928 is not a tax but a penalty intended as a punishment for allegedly fraudulent acts. Having once sought unsuccessfully to punish respondent for those acts, the present attempt of the Government to impose such a penalty places respondent in double jeopardy in violation of his constitutional rights.

The decisions of this Court have consistently held that any addition to a tax, whatever it may be called, if designed to punish, is penal in its nature and may not be imposed after an unsuccessful criminal proceeding brought to punish the same acts.

Petitioner's argument that the statute as to the fifty per centum addition was meant to discourage fraud, does not, of itself, exclude such an addition from classification as a punishment. The possible $10,000 fine attending a conviction under Section 146(b) of the Revenue Act of 1928, like the prison sentence, has the same purpose of discouraging fraud, but this does not make the former a tax.

Additions to taxes have been considered by the courts sometimes as penal and sometimes as a mere tax, depending upon the nature and purpose of the particular addition.

II

The judgment of acquittal bars petitioner from seeking a contra determination upon the same acts and transactions. All the acts and intentions essential to the imposition of the fifty per centum addition were put in issue and determined against the government in the criminal trial. There is complete identity of parties and issues in these two proceedings. This case is not to be confused with those in which criminal intent was not involved in the second proceeding and in which plaintiff might recover regardless of the outcome of the prior criminal case. For in the present case the finding of fraud is a prerequisite to the imposition of a fifty per centum penalty.

ARGUMENT

I

The fifty per centum addition is not a tax but a penalty intended for punishment. Its imposition would place respondent in double jeopardy.

A. ***The fifty per centum addition to the tax deficiency is a penalty intended for punishment.***

To justify the imposition of an "additional tax" under Section 293(b) there must be a finding of fraud with intent to evade a tax. Wilful failure to pay a tax is declared by Section 146(b) of the same Act to be a felony punishable by fine and imprisonment. The Court of Appeals held, and its holding is justified by the facts found by the Board of Tax Appeals, that

> "From the indictment and the charge of the court in the criminal prosecution it is clear that the Government relied on the same facts as it relies on in the case at bar to establish fraud" (R. 447).

As fraud presupposes a plan conceived before its execution, it must of necessity be wilful. There can be no act of fraudulent evasion under Section 293(b) that would not also be a wilful evasion under Section 146(b). The penalty prescribed by Section 293(b) is imposed only because of acts which, when committed, constitute a crime. Recognizing this, the Court of Appeals said:

> "But the acquittal of Mitchell under the indictment founded on section 146(b) necessarily involved a finding that he was guilty of no fraud, since fraudulent intent 'to evade or defeat' a tax would necessarily involve the wilful attempt to 'evade or defeat' broadly covered by section 146 (b)" (R. 447).

If the penalty of $364,354.92, sought here to be imposed upon respondent by reason of his alleged fraud, would not be a true tax, but merely a punishment for that fraud, then common sense and precedent alike require a holding that the imposition of such a punishment would constitute double jeopardy.

The fact that the words "tax" or "addition to the deficiency" are used to describe the imposition, or that collection is made through the Bureau of Internal Revenue of the Treasury Department, is of no significance if the real purpose of the imposition is to define and suppress a crime. (*Child Labor Tax Case*, 259 U. S. 20; *Helwig* v. *U. S.*, 188 U. S. 605; *Dorsheimer* v. *U. S.*, 7 Wall. 166.)

Although this Court has not established any mechanical test for distinguishing between taxes and penalties, it has

indicated certain determining factors. For example, an imposition meant for punishment will not be considered in the same light as a true revenue provision whether found in the same or in another act. So also, there is a definite distinction between a heavy penalty imposed in addition to an ordinary tax and because of some wrongful act amounting to a crime, and a mere nominal addition to the tax for failure to file a return on the exact date specified. Even though termed a tax, the assessment is under suspicion of not being a true tax, when levied because of illegal acts. (*United States* v. *La Franca*, 282 U. S. 568.) So, too, if

> "evidence of a crime is essential to the imposition of a tax, the courts do not hesitate to pronounce it a penalty, even if it may incidentally bring in revenue."

(*Regal Drug Corp.* v. *Wardell*, 260 U. S. 386; *Lipke* v. *Lederer*, 259 U. S. 557.) Nor does the fact that the penalty may be superimposed on what is clearly a tax lessen the penal character of the former. (*Helwig* v. *United States*, 188 U. S. 605, 614-616, citing and adopting opinions of the Attorney General to this effect in 4 Ops. Atty. Gen'l. 182, 5 Ops. Atty. Gen'l. 730, and 20 Ops. Atty. Gen'l. 660.)

In 17 Ops. Atty. Gen'l. 433 and in 23 Ops. Atty. Gen'l. 398, the fifty per centum addition provided by Revised Statutes, Section 3176, for neglect or refusal to make a verified return, was said to be a penalty.

Section 293(b) provides that the fifty per centum addition is

> "in lieu of the fifty per centum addition to the tax provided in Section 3176 of the Revised Statutes, as amended."

Thus the penal character of the "addition" is made clear.

A review of the decisions of this Court compels us to the conclusion that (1) if a so-called tax is meant primarily to suppress a certain kind of conduct, rather than to supply regular revenue for the support of the Government, or (2) if the addition is greatly out of proportion to the ordinary tax, or (3) if it is levied upon a particular act because of its fraud, then it is regarded as a penalty and punishment rather than a mere tax. *United States* v. *La Franca,* 282 U. S. 568; *Regal Drug Co.* v. *Wardell,* 260 U. S. 386; *Child Labor Tax* Case, 259 U. S. 20; *Lipke* v. *Lederer,* 259 U. S. 557; *Helwig* v. *United States,* 188 U. S. 605; *Passavant* v. *United States,* 148 U. S. 214; *Wright* v. *Blakeslee,* 101 U. S. 174; *Bartlett* v. *Kane,* 16 How. 263; *Dorsheimer* v. *United States,* 7 Wall. 166.

The conclusion that the fraud penalty provided by Section 293(b) is not a part of an ordinary tax or deficiency is also supported by *Moore Shipbuilding Co.* v. *United States,* 50 F. (2d) 288, wherein the court held that interest on a fifty per centum penalty ran only from the date of the assessment rather than from the date of the deficiency—as would have been the case had the penalty been a part of the tax. The court in justifying that conclusion said (p. 291):

> "* * * The 50 per centum does not relate to income, but is founded solely upon fraud and is not payable by reason of income but by reason of fault. There must be a finding of a false and fraudulent omission whereby the penalty was incurred without which it can neither become due nor be added. Michigan Central R. Co. v. Slack (Circuit Court, Mass.) Fed. Cas. No. 9527.
>
> The requirement that the penalty shall be 'added as part of the tax' means merely that it be assessed and collected as though it were a tax; without this

> provision the Commissioner could not assess and collect the penalty by the summary proceeding of distraint. In the very nature of things, therefore, the reason for the penalty does not exist until the Commissioner has determined that the return was willfully false or fraudulent with intent to evade the tax and the taxpayer is not required to pay it until demand is made."

Let us see how petitioner supports his initial argument that the fifty per centum addition may not be regarded as additional punishment for the crime of which respondent was acquitted. First, he asserts that the legislative history of Section 293(b) shows that Congress intended the fifty per centum addition merely as a civil safeguard for the assessment and collection of revenue, as distinguished from the criminal punishments provided in Section 146(b). But the statutes he cites as showing the development of Sections 293(b) and 146(b) do not, to our way of thinking, show any legislative intent that the penalty provided as an addition to the tax should not be considered as a punishment. A mere continuation of similar provisions in sucessive statutes will not, of itself, indicate an intention not specifically announced for them either by the Congress or the courts. Despite that array of statutes, petitioner has failed to cite any authority supporting his bald statement that the fifty per centum fraud penalty provided by Section 293(b) is not a punishment. Surely if those statutes carried any such intent as is urged by Petitioner, some indication thereof could be found in reported cases or Congressional action. The lack thereof is significant.

Petitioner's second assertion is that the courts have uniformly treated Section 293(b), as well as its statutory

predecessors and similar provisions in internal revenue and customs laws, as entirely civil in effect. But again petitioner's brief discloses no case holding that Section 293(b) is entirely civil in its effect. As to preceding and similar statutes, instead of uniformity of treatment, the courts have given separate consideration to the nature of each so-called tax, and wherever it appeared that the purpose thereof was to punish or prevent acts constituting a crime, they have not hesitated to declare the so-called tax a penalty.

At the outset, petitioner is forced to concede

> "that the addition to the tax imposed by Section 3176 of the Revised Statutes, as amended, was referred to as a penalty in 17 Op. A. G. 433 (1882), and has been so denominated in decisions of the courts" (Pet's. Br., p. 13).

This concession of itself opposes his assertion of uniform treatment. To avoid the effect of this unavoidable concession, petitioner cites *Tayloe* v. *Sandiford,* 7 Wheat. 13, 17, and *Stearns* v. *United States,* 22 Fed Cas. 1188, 1192. The *Tayloe* case involved a "penalty" bond given by one individual to another for completion of certain construction work, and the *Stearns* case involved a penal bond for a prisoner who had failed to observe jail limits. In citing these cases as supporting the proposition that the fifty per centum addition imposed by Section 293(b) is not a punishment, petitioner has gone far afield, for it needs no argument to demonstrate that in law the word "penal" as used in such a bond is not used in relation to punishment for a criminal act.

So too the decided cases holding that "taxes" imposed for the commission of unlawful acts, even though they may be "civil in nature", are likewise penal and punitive, and different from true taxes, of themselves destroy petitioner's argument that there is a long line of judicial decisions treating Section 293(b) and similar provisions as entirely civil in nature. An analysis of these cases shows the reasonableness of placing the fifty per centum addition in the category of a punishment and supports the opinion of the Court below in that regard.

In *Helwig* v. *United States*, 188 U. S. 605, the court was called upon to determine the nature of a "further sum" imposed (under the Customs Administrative Act of 1890, 26 Stat. 131), whenever the appraised value of merchandise exceeded by more than 10% the valuation declared by the importer. The issue was one of jurisdiction, for if the suit to collect the penalty was one arising under "any act providing for revenue, and not being one for penalty or forfeiture", it should have been brought in the Circuit Court; whereas if it was for a "penalty or forfeiture" then, by virtue of a statute in force at that time, exclusive jurisdiction would have been in the District Court. This Court declared for jurisdiction in the District Court in these words (p. 610):

> "The sole question is whether the sum imposed by Section 7, already quoted, is a penalty.
>
> "Without other reference than to the language of the statute itself, we should conclude that the sum imposed therein was a penalty. It is not imposed upon the importation of all goods, but only upon the importer in certain cases which are stated in the statute, and it is clear that the sum is not imposed for any purpose of revenue, but is in addi-

> tion to the duties imposed upon the particular article imported, and in each individual case when the sum is imposed it is based upon the particular act of the importer. That particular act is his undervaluation of the goods imported, and it is without doubt a punishment upon the importer on account of it. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character. If it be said that the provision operates as a warning to importers to be careful and to be honest, it is a warning which is efficacious only by reason of the resulting imposition of the 'further sum', in addition to the duties, provided for by the statute."

What more apt words could be found to characterize the fifty per centum additional tax here sought to be imposed upon respondent? It is not a tax upon his income. It is a sum based upon a particular act of the taxpayer—his allegedly fraudulent return. If it is meant to aid the collection of revenue by warning other taxpayers to be careful and honest, it is efficacious only by reason of the resulting imposition of the "additional tax in addition to the duties provided for by the statute."

The *Helwig* case reviews in detail various customs acts from 1818 to 1897. It may be fairly said to hold that additional duties imposed because of the commission of fraudulent acts constitute penalties, unless there is a specific expression of a legislative intent that the addition is not to be so regarded. The very factor upon which petitioner relies in his discussion of the *Helwig* case (Pet. Br. p. 20) namely, a specific provision that the additional duties should not be construed as penal, is wholly lacking in the present case. In its absence the usual judicial rule of construction holding such provisions to be penal should be followed.

In *Bartlett* v. *Kane*, 16 How. 263, "additional duties" had been levied upon an importer (under the Tariff Act of 1846, 9 Stat. 43) for undervaluation. The law provided for a refund of duties upon re-exportation, and the regular duties had been returned. The importer, however, claimed that the "additional duties" should also be returned. The court disallowed the claim, and thereof it said (p. 274):

> "An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty.
>
> "The provision for the return of the duty upon a re-exportation, formed a part of the system of regulations for importation and the revenue from the earliest period of the government, and has always been understood to establish relations between the regular and honest importer and the government.
>
> "It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice."

A like careful differentiation between tax and penalty is found in *Dorsheimer* v. *United States*, 7 Wall. 166. By the Internal Revenue Act of 1864, collectors were authorized to prosecute for the recovery of fines, penalties and forfeitures in the name of the United States. One-half of the amount recovered was to go to the collector or deputy, who should first "inform of the cause, matter or thing whereby such penalty may have been incurred." Information was furnished by Dorsheimer, charging that a distiller, by false returns, had fraudulently withheld taxes in the amount of $195,000. The distiller's property was seized, and forfeiture proceedings begun. Thereafter, the Secretary of the Treasury, on payment of the taxes by a third party intervenor, released the seized property and over the protest of Dorsheimer, accepted a small sum in lieu of penalty.

This court upheld the Secretary's action, saying (p. 173):

> "The purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit. The offer of a portion of such penalties to the collectors is to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes."
>
> "As the great object of the act 'to provide internal revenue' is to collect the tax, the Secretary of the Treasury has no power to remit it. When the primary object of collecting the tax is obtained, as in the present case, the further infliction of penalties is submitted entirely to the discretion of the secretary."

Far from holding (as petitioner, by his reference thereto [Pet. Br. pp. 16, 17], would have us infer), that it was one of a long line of cases holding that an addition to a tax was a mere sanction and not a penalty, the decision in the *Dorsheimer* case appears to be based squarely upon the principle that the addition to the tax was a penalty quite apart from the tax itself, and that, therefore, the infliction of this penalty was discretionary with the Secretary.

All of the cases heretofore discussed herein which held the addition to be a penalty or punishment were civil in their nature. In all of them the rules of evidence and of procedure applicable to civil actions were applied, except that the defendant could not be compelled to bear witness against himself (*Lees* v. *United States*, 150 U. S. 476, 480; *Boyd* v. *United States*, 116 U. S. 616). This application of rules of civil procedure included admissibility of evidence (*United States* v. *Zucker*, 161 U. S. 475), also quantum of proof (*United States* v. *Regan*, 232 U. S. 37), and direction of verdicts (*Hepner* v. *United States*, 213 U. S. 103). The penalties provided by the several statutes involved in those cases were either assessed by administrative officials or sued for in a civil action.

Despite the fact that the statutory provisions so enforced were civil in their nature, or at most *quasi criminal* —this term was applied to them in *Boyd* v. *United States*, *supra*, (p. 634)—they were uniformly held to be penalties, *i.e.*, punishment for wrongful conduct. In none of the cases did the fact of adherence to the civil forms of action militate against a determination that the imposition was penal in character. And in each case this holding led to a result that would not have occurred had the court accepted the

claim that the impositions in question were but part of a revenue producing program.

Petitioner would divide penalties into two classes (Pet. Br. pp. 14, 15), (1) penalties for crime such as he claims were involved in *United States* v. *La Franca*, 282 U. S. 568, *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386, *Lipke* v. *Lederer*, 259 U. S. 557, and *Wong Wing* v. *United States*, 163 U. S. 228, and (2) penalties which do not follow as a result of the commission of crime and which petitioner calls "mere sanctions to enforce obligations validly imposed by the Congress." Under this second so-called classification, petitioner cites no cases dealing with additions to income taxes or to customs duties. The only case he refers to is *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, which involved a penalty against a steamship company for bringing into this country an alien infected with a loathsome or contagious disease. In that case there was no question of the imposition of an additional sum because of the commission of acts tantamount to a crime. In fact, in referring to the power to impose the exaction, this court expressly said:

> "it is apparent that it does not purport to define and punish an infamous crime, or indeed any criminal offense whatever" (p. 337),

The *Stranahan* case neither supports nor furnishes persuasive reasoning for the adoption of petitioner's argument that the addition to the tax involved in this case is not a penalty.

In that case, as well as in *United States* v. *Nash*, 111 Fed. 525, in *Doll* v. *Evans*, 7 Fed. Cas. 855, and in *Clay* v. *Swope*,

38 Fed. 396, there was no question of double jeopardy before the court. The *Stranahan* and the *Nash* cases involved the imposition of penalties for acts not criminal or subject to any other punishment than the civil penalty. *Doll* v. *Evans* and *Clay* v. *Swope* merely permitted a penalty to be collected by distraint.

Neither the method of collection nor the taxpayer's inability to invoke the aid of equity to enjoin collection are determinative of the punitive character of such additions. *Helwig* v. *United States, supra; United States* v. *Chouteau,* 102 U. S. 603; *Dorsheimer* v. *United States, supra.*

This principle was recognized by this court in *United States* v. *Chouteau, supra,* as follows (p. 611):

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

Petitioner seems to place considerable reliance upon *McDowell* v. *Heiner,* 9 F. (2d) 120, affd. 15 F. (2d) 1015, cert. den. 273 U. S. 759. There an action was brought to enjoin the collection of penalties levied upon (fraudulent) income tax returns, under sections of the 1913 and 1918 income tax acts substantially similar to section 293(b). The court refused to grant injunctive relief against distraint and seizure of the property. In direct contradiction of the idea that the penalty tax there involved was not intended for punishment, the *McDowell* case at least implies that punishment was the main purpose of the fifty per centum penalty there involved. There the court, said (p. 123):

> "The Constitution does not guarantee trial by jury for the imposition of penalties for the non-payment of taxes. None of the constitutional provisions relative to the right of trial by jury have any application here, as the plaintiff is not being tried for a crime. Money penalties may be sued for and recovered in civil actions, and criminal prosecution is not necessary. *Hepner* v. *United States*, 213 U. S. 113, 29 S. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960."

Although petitioner insists that the method of collecting a penalty determines its character as between the tax and penalty, the decided cases refute this theory. All that was held in the *McDowell* case (and the *Stranahan* case which it followed), was that Congress had power to fix the manner in which the additional levy or the additional penalty was to be collected. On account of the many different actions on account of which Congress may impose penalties, it is to be expected that there might be some differences in the methods prescribed for their collection. Procedural forms, however, cannot control the substantive nature of the penalty itself. Its true character can only be determined from the nature of the action penalized. In the present case, it is clear that the fifty per centum addition results not from any tax calculation but only because of a finding of fraudulent and hence wilful evasion of a tax, and that the fifty per centum addition is wholly penal.

Petitioner concedes (Pet. Br. pp. 14, 15) that penalties which he describes as imposed to punish crime

> "would be barred by an acquittal in a prior criminal prosecution for the crime for which such penalties are a part of the punishment" (Pet. Br. p. 15).

However, nothing is found in any of the four cases referred to by petitioner as illustrating this situation, indicating that the civil penalty there involved might form a part of any criminal sentence consequent on trial and conviction. It would seem therefore that the only contention not closed against petitioner is his primary contention that the fifty per centum addition imposed under Section 293(b) is not a punishment. If he is wrong in this, and if that addition is in the nature of a penalty then, under the cases he relies on, and upon his concession that if this penalty is in the same class as those imposed by Section 35 of the Prohibition Act, it would be barred by an acquittal in a prior criminal prosecution, the judgment of the Court of Appeals must be upheld.

Petitioner's third argument (Pet. Br. pp. 26-30) is that the fifty per centum addition is to compensate the Government for alleged added expense (in the collection of its revenues) occasioned by fraudulent concealment. He intimates that if the penalty is not allowed, taxpayers whose honesty has not been questioned by the Government, will ultimately have to bear the expense of this and similar suits. The maintenance of an adequate tax force is a responsibility of government and the cost thereof should be part of its regularly budgeted expense. No showing has been made that the expenses of the Treasury Department's investigators are or ought to be regularly met from fines and penalties imposed for tax violations.

Petitioner cites *Stockwell* v. *United States*, 13 Wall 531, as authority for the proposition that a statute providing that any person who knowingly receives or conceals illegally imported goods shall be liable in double the value of the goods is "compensatory". No question of double jeopardy

was there presented nor did the Court by using the word "compensatory" mean to detract from the essentially punitive character of the penalty.

The question at issue was merely whether the Act of 1823 imposing the double value payment had been superseded by a purely penal Act of 1866. The Court held in the negative, considering that Congress need not confine itself to one type of punishment but that punishment might be meted out to the wrongdoer either by civil or by criminal proceedings.

Thereof, the Court said (p. 552):

> "But the true question is whether a wrongdoer may not be both civilly and criminally responsible for the same act, and it would not be strange if Congress had given *the option to sue for double values or to prosecute for the crime.*" (Italics ours.)

Had the question of double jeopardy been presented it is probable that the Court, in harmony with the above reasoning, would have squarely held that there must be an election under the option and that both penalties could not be imposed for the same wrong.

Petitioner's fourth argument (Pet. Br. pp. 30-32) is that the fifty per centum addition is in the nature of a special surtax imposed on the basis of fraud. The argument seems to rest upon the statute of 13 Eliz. c. 5 (1570), dealing with conveyances in fraud of creditors. That statute does not deal with taxes or surtaxes. Although petitioner argues that separate treatment for fraud was given in 1570, the pertinency of the argument to the present case is obscure. Certainly he cannot argue that fraud was first discovered or prohibited in that year.

The weakness of this argument is disclosed by the even greater weakness of the analogy upon which petitioner relies for its support, namely, the tax imposed by Section 104 of the Revenue Act of 1928 (formerly Section 220 of the Revenue Acts of 1918, 1921, 1924 and 1926). Such a tax placed upon holding corporations employed to avoid the incidence of large surtaxes upon the individual stockholder is plainly not a special punitive tax upon a crime. The controlling stockholders of a corporation made subject to Section 104 may freely continue the use of a corporate *alter ego* without fear of criminal penalty so long as they pay the rate of tax imposed upon such a corporation. This corporate practice is not made a crime, and no double jeopardy can ever arise by reason of it. The illustration is entirely irrelevant to the issues here involved.

Petitioner's fifth argument (Pet. Br. pp. 32-36) is that a holding that the addition is punitive would cast serious constitutional doubt upon the administrative application of section 293(b) as a civil safeguard for the protection of the revenue. In this argument, petitioner assumes fanciful situations and conjures up fears which have no real substance. If his reference to the Prohibition cases (*Lipke, Regal Drug Corporation,* and *La Franca*) is intended to cast doubt upon the legal right of petitioner to enforce the collection of the ordinary tax and the penalty by administrative action or civil suit, it is groundless for that issue is not involved in this case, and no claim is being made that petitioner lacks such power. Nevertheless, while again stressing the fact that the punitive nature of the penalty is not determined either by the entity selected, or the procedure provided by law to enforce its collection, we find it

necessary, in order to prevent misapprehension, to point out that petitioner's argument that the Government would be forced to proceed by criminal indictment and trial in all fraud cases is unsound. It may proceed either by criminal indictment or by civil action. The only limitation is that after a taxpayer has been once subjected to risk of punishment in a criminal proceeding, he may not be again subjected to that risk for any of the acts that formed the basis of the earlier criminal prosecution.

As a sixth and final argument, petitioner urges that the *Coffey* and the *La Franca* decisions do not control. These decisions will be later discussed in detail.

Contrary to petitioner's assertion that there is a long line of judicial decisions treating Section 293(b) and antecedent and similar provisions as entirely civil in their nature, an examination of those decisions will show that the Courts have held that if a so-called tax is intended less for revenue than to suppress a type of conduct, or if it is imposed because of a fraudulent and illegal act, then the so-called tax is a penalty or punishment.

B. *The constitutional provisions against double jeopardy bar any present imposition of the fifty per centum addition to the tax.*

We come now to consider whether the attempted imposition of such a penalty, after respondent's indictment and acquittal upon the same charges as those made in the effort to collect the penalty, places respondent in double jeopardy.

The Constitution safeguards a man from being twice placed in peril of punishment for one offense. Respondent has anticipated only in one series of wrongful acts, namely,

the filing of an income tax return for 1929, in which he claimed a deduction and omitted a bonus payment. For this conduct respondent was indicted, tried and acquitted. Thereby he was subjected to the risk of punishment by imprisonment and fine. Now petitioner seeks to hold respondent liable not only for the tax upon the deducted and omitted items, but also for a further sum—in effect a fine of $364,354.92 imposed as a punishment for his fraudulent conduct.

The doctrine of double jeopardy does not protect a man from the civil consequence of a criminal act. For example, if a man be convicted of reckless automobile driving and imprisoned or fined therefor, that conviction and punishment does not bar a suit for damages by any person injured, although the injury results from the very act for which the conviction was had. So likewise whether respondent had been acquitted or convicted of fraud in a criminal action the doctrine of double jeopardy would impose no bar on the subsequent assessment of a tax due on the deducted or omitted items. The doctrine of double jeopardy, however, does bar this item of $364,354.92 because it is imposed not as a pure tax but as a further punishment. *Boyd* v. *United States*, 116 U. S. 616.

Thus in *Stone* v. *United States*, 167 U. S. 178, the defendant had been acquitted of the crime of intentionally cutting and removing timber from land belonging to the United States. Subsequently, the Government sued the defendant for the value of the timber so cut and removed. The defendant contended that his prior acquittal was a bar to this suit, and relied upon the *Coffey* case to sustain his contentions. This Court ruling against that contention, said (p. 187):

> "The present action is unlike that against Coffey. This is not a suit to recover a penalty, to impose a punishment, or to declare a forfeiture. The only relief sought here is a judgment for the value of property wrongfully converted by the defendant. The proceeding by libel against Coffey, although civil in form, was penal in its nature, because it sought to have an adjudication of the forfeiture of his property for acts prohibited. It was, as we have seen, a case in which a punishment denounced by statute was sought to be inflicted as a consequence of the existence of facts that were in issue and had been finally determined against the United States in a criminal proceeding."

There the judgment sought in the civil case was obviously not by way of punishment for a criminal act but only to recover the value of its own property which defendant may have innocently and without criminal intention converted to his own use.

In *Murphy* v. *United States*, 272 U. S. 630, the defendants had previously been tried and acquitted of maintaining a nuisance in violation of the Prohibition Act. Subsequently the Government sued in equity to abate the same alleged nuisance. The defendants proved their former acquittal and moved to dismiss. This court, however, held that such acquittal was not a bar to the civil suit for the abatement of the nuisance. In reaching this result the court made it clear that it did not regard the abatement of the nuisance as a punishment for the crime of which the defendants had been previously acquitted. Thereof it said (p. 632):

"It appears to us that the purpose is prevention, not a second punishment that could not be inflicted after acquittal from the first. * * *

"* * * That it did impose a punishment is the only ground on which the former judgment would be a bar."

The Court took particular pains to point out that any detrimental effects of the second proceeding (padlocking for the period of a year the premises whereon the nuisance had been maintained) could be avoided by posting a bond against illegal use of the premises. There, indeed, the only issue in the second civil trial was, did the nuisance in fact exist? If it did, the defendants had no right to continue it and were not being punished by its abatement. No question of criminal intention was involved in the civil suit.

Generally similar are *United States* v. *Warner Brothers Pictures, Inc.*, 13 Fed. Supp. 614, and *United States* v. *Donaldson-Shultz Co.*, 148 Fed. 581. The first of these cases involved a civil action for injunction against a violation of the Sherman Act after the defendants had been acquitted of a criminal charge based thereon; and the second involved an action for injunction against the obstruction of a navigable stream, after acquittal of a criminal charge for violating a statute punishing any such obstruction. In each of these cases the object of the second civil action was not to punish alleged criminal acts of which the defendants had been previously acquitted, but merely to enforce rights possessed by the Government irrespective of any criminal act or intent on the part of the defendants. These cases would be applicable here if this proceeding represented merely an attempt to recover the ordinary tax

without a fifty per centum penalty, in which case, petitioner could well argue that respondent's acquittal did not preclude the enforcement of whatever ordinary tax might be due.

The only cases, pertinent to the question here involved, are those in which the second proceeding is based upon acts penal in character.

In *United States* v. *Chouteau*, 102 U. S. 603, a distiller had been indicted for fraudulent evasion of taxes. A compromise and settlement was made with the Government. Subsequently a suit for penalties was brought. This court held that the settlement of the criminal proceedings barred the second action. Thereof it said (p. 611):

> "Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect. The government through its appropriate officers has indicated, under the authority of an act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this court in Ex parte Lange, speaking through Mr. Justice Miller, 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is

> proposed in the same court, on the same facts, for the same statutory offence. The principle finds expression in more than one form in the maxims of the common law'."

In *Coffey* v. *United States*, 116 U. S. 436, Coffey had been acquitted on a prior criminal trial. Subsequently the Government brought a proceeding for the forfeiture of certain spirits and property based upon the same acts theretofore asserted to have been criminal. Coffey pleaded his former acquittal as a defense, and the Government demurred. This court held that Coffey's plea was good, saying (p. 444):

> "The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

The second *Coffey* action was based upon the same alleged acts and evasions as had been tried in the criminal case. Such is the situation in our case. The *Coffey* case does not stand alone as supporting the doctrine that a second punishment will not be permitted even though sought to be recovered in a civil proceeding.

Petitioner seeks to throw doubt on the present status of the *Coffey* case by reference to *Various Items* v. *United*

States, 282 U. S. 577. This case involved a proceeding to forfeit a distillery on the ground that the operating corporation had conducted its distilling business with intent to defraud the government of tax. The government admitted that prior to this action the corporation had been indicted and convicted along with others for conspiring to violate the statute, upon the same transactions as were set forth as a basis for forfeiture. Petitioner points out that despite this identity of transaction, the action against the corporation for conspiracy was held not to bar the proceeding *in rem* against the distillery. But the *Various Items* case was decided at the same time as the *La Franca* case, *supra*, which applied the doctrine of double jeopardy where a civil penalty for violation of the law was sought to be enforced by an action *in personam* rather than *in rem*. Indeed, in the *Various Items* case the court adverted to its decision in the *La Franca* case and distinguished it so as to completely refute the petitioner's argument here, at least insofar as the present action *in personam* is concerned. Thereof the court said (p. 581):

> "'Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.'
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> • • • • • • •
>
> "A forfeiture proceeding under Rev. Stat. 3257 or 3281, is in rem. It is the property which is pro-

> ceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.* * *"

Petitioner seeks to distinguish *United States* v. *La-Franca, supra,* by arguing that this court there held that the exactions involved were not true taxes but penalties intended as punishment for infraction of the law. To support this alleged distinguishing characteristic it is incumbent upon petitioner to establish that the fifty per centum addition to the tax under Section 293(b) is a true tax. None of the cases cited by petitioner do this, and his argument to that effect is not convincing. In fact, the *La Franca* case would seem a direct refutation, for this court herein said:

> "Of the four items involved, two unmistakably are penalties, and are so denominated. The other two, notwithstanding they are called taxes, are in their nature also penalties."

As to the double jeopardy feature the court said:

> "* * * Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?" (282 U. S. 568, 573).

In holding that it did not, this court cited *United States* v. *Chouteau, supra, United States* v. *McKee,* 4 Dill. 128, and *United States* v. *Gates,* Fed. Cas. 15,191.

Recently, the courts have had to consider the question of double jeopardy in *United States* v. *Glidden Company,*

78 F. (2d) 639; cert. den., 296 U. S. 652. This was a suit by the United States to recover a tax for the diversion of denatured alcohol. Glidden Company plead in bar a prior conviction and fine for conspiracy to violate the Prohibition Act. The court sustained the plea, holding that the suit would place defendant in double jeopardy, and citing *Lipke* v. *Lederer, supra,* and *United States* v. *LaFranca.*

Petitioner would have this court overrule the *Coffey* case if it stands in the way of the imposition of the fifty per centum penalty here sought. He argues that the Government's right to collect its revenue should not be subjected to the uncertainties of a criminal prosecution; and that regardless of the outcome of the latter, it should be privileged to collect its tax and any penalty related thereto. Respondent does not question the Government's right to collect its revenue (*i.e.,* any tax justly due) either before or after a criminal prosecution and regardless of the result of the latter.

Under present statutes Petitioner has available two procedures for the collection of any tax due, and for the imposition of punishment in the event that acts constituting fraud can be proved. Under certain circumstances, the facts may warrant a criminal prosecution. Conviction would inflict punishment and the assessment of any tax due would follow. If acquitted the taxpayer would have been placed in jeopardy. Nevertheless, an assessment and possible collection of tax would not be prevented by the criminal proceeding. But the taxpayer who has been found not guilty under an indictment charging wilful and fraudulent evasion of tax should not a second time be subjected to what in fact is tantamount to a heavy fine,

capable of being imposed only for the same acts for which the taxpayer has already been indicted, tried and acquitted. The collection of Governmental revenue is adequately protected by the statutory remedies available to petitioner. Speaking for this court, in *Lipke* v. *Lederer, supra,* Mr. Justice McReynolds said (p. 562):

> "The guarantees of due process of law and trial by jury are not to be forgotten or disregarded."

Equally the constitutional guarantees against double jeopardy should not be forgotten or diregarded.

II

All the facts and intents requisite to the imposition on respondent of the fifty per centum addition to the deficiency were put in issue and determined against the Government in the criminal trial, and the judgment of acquittal bars petitioner from obtaining a second judgment based upon the same facts and intents.

Identity of parties in this proceeding and in the criminal trial has not been questioned by the petitioner throughout this proceeding.

Identity of issues is established both from the findings of fact (R. 79) and from the opinion of the Court below (R. 447), wherein the Court stated with reference to the criminal trial that "it is clear that the government relied upon the same facts as it relies on in the case at bar to establish fraud."

The conclusive character of an acquittal in a criminal case as a bar to civil action involving the collection of a

penalty based upon the facts and intents involved in the criminal case has been decided by this Court in *Coffey* v. *United States, supra.* This Court there dealt squarely with the effect of the indictment, trial and verdict of acquittal in the prior criminal action, as disclosed by the opinion itself as follows (pp. 442-443):

> "The principal question is as to the effect of the indictment, trial, verdict and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on §§3257, 3450, and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit. The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is.
>
> "It is true that §3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited; and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in *The Palmyra,* 12 Wheat., 1, 14. Yet, where an issue raised *as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of*

> *acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person,* on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.* * * * It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem.* Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

The petitioner himself has recognized the force of the *Coffey* case by conceding that

> "The *Coffey* case has been discussed by this Court and its doctrine has been carefully delimited as meaning that facts ascertained in the criminal case, as between the United States and the defendant, may not be 'again re-litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts' (italics as in original)." (Pet. Br. p. 55.)

Petitioner, however, confuses the true doctrine of the *Coffey* case, as is shown by his contention that its applicability in the field of *res judicata* was definitely rejected by this Court in *Murphy* v. *United States, supra,* (Pet. Br. 55). This Court did not so reject the *Coffey* case in the *Murphy* case.

No useful purpose is served by considering in detail whether or not the application of the *Coffey* case has been limited or rejected as to features not here involved.

As heretofore pointed out, the true distinction between the situation in the *Coffey* case and that which prevailed in the *Murphy* case, the *Stone* case, the *Warner Brothers Pictures* case, and the *Donaldson-Shultz* case, is that in these last four cases no question of criminal intent was involved in the second civil proceeding. This Court, therefore, quite properly decided that a verdict or judgment based upon issues involving criminal intent could not be *res judicata* in proceedings not involving that vital issue. The Court or jury might have found in favor of the Government on all the issues save that of criminal intent, with a resulting acquittal in the first trial, whereas with this issue absent in the second proceeding the Government might prevail. Recognizing this difference in the *Stone* case, this court said (p. 187):

> "The present action is unlike that against *Coffey*. This is not a suit to recover a penalty, to impose a punishment, or to declare a forfeiture. The only relief sought here is a judgment for the value of property wrongfully converted by the defendant."

The question of criminal intent was completely lacking in the second *Stone* proceeding.

In the present case, however, the existence of criminal intent is as essential to the imposition of the fifty per centum addition to the deficiency as it was in the criminal proceeding. This is the all important factor which makes the doctrine of the *Coffey* case applicable and distinguishes all the arguments and decisions submitted by petitioner in opposition.

Petitioner argues at length that the issue of fraud involved in Section 293(b) was not an issue in the criminal prosecution under Section 146(b), and cites *United States* v. *Scharton,* 285 U. S. 518. The *Scharton* case came up on a motion to quash the indictment because the offenses were committed more than three years prior to the return of the true bill. A three-year Statute of Limitations applied except for offenses in fraud of the United States, in which event the period was fixed at six years. This Court held that under the statute it would be sufficient to plead and prove a wilful attempt to evade or defeat, and that an averment of fraud would be surplusage.

Petitioner's reasoning therefrom is wholly fallacious. Accepting his construction of Section 146(b) and ignoring the express language of the indictment against respondent, which charged a wilful and fraudulent attempt to evade, petitioner must at least concede that the criminal charge involved a wilfull attempt in some manner to evade, a tax. "Wilful" implies a knowledge, a direction and a planning of the act committed. A wilful attempt requires an intention to do the act. Under every legal test a wilful act done with intention to evade, would be frandulent. It may not be fairly argued that the language of Section 293(b)

does not embrace all the elements of Section 146(b). It may be that in an indictment drawn under Section 146(b) an allegation of fraud is not required, even though fraud is implicit in the section. See *United States* v. *Murdock*, 290 U. S. 389, in which this Court, passing upon the question of whether the word "wilful" as used in Section 146(a) implied bad faith or evil intention, said:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by *bad faith or evil intent, which the statute makes an element of the offense.*" (Italics ours.)

Petitioner's argument is in effect that respondent could have been tried and convicted under Section 146(b), without there being present any element of bad faith, evil intent or fraud. The mere statement of such a proposition should carry its own refutation.

Nor does the fact that the consequences of the two proceedings might be different affect the finality of the adjudication where the issues are identical. Upon a showing, as here, that the parties and issues are identical, it matters not that the consequences of one proceeding would possibly be imprisonment and fine, and in the other a monetary penalty. The only case cited by petitioner on this phase of his argument (*Ash Sheep Co.* v. *United States*, 252 U. S. 159), does not support his theory. There the Equity Court in the first proceeding had refused to entertain the question of penalties, and so there was no previous adjudication, and no estoppel against pursuing the collection of penalties in any appropriate proceeding.

The true ground for the decisions in *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362, and *Schindler* v. *Royal Ins. Co.*, 258 N. Y. 310, was lack of identity of parties.

Although petitioner refers to a slight difference in evidence he concedes that

> "the test is not whether the evidence is the same in the two proceedings but whether the issue was identical" (Pet. Br. p. 59).

The issues being identical, immaterial variations in the evidence are of no importance.

Petitioner further argues that because the *quantum* of proof required in a criminal prosecution is different from that required here, respondent's acquittal is no bar to petitioner's recovery of the addition to the deficiency in this proceeding. This argument was urged upon this Court in the *Coffey* case, but inasmuch as the same parties and same issues were present in both proceedings, the degree of proof supporting the judgment was not permitted to nullify its effect.

This rule is consistent with the principles which have been applied in declaring the effect to be given to judgments previously obtained between the same parties on the same issues. Thus a judgment obtained in one state between the same parties upon the same issues is entitled to full faith and credit in another state despite the fact that, because of certain rules (either substantive or procedural) prevailing in such other state, a contrary result might have been obtained had suit originally been commenced in the other state (*Kenney* v. *Supreme Lodge of the World, Royal Order of Moose*, 252 U. S. 411; *Sistare* v. *Sistare*, 218 U. S. 1; *Fauntleroy* v. *Lum*, 210 U. S. 230).

In *Kenney* v. *Supreme Lodge, etc., supra*, an action of debt was brought in Illinois upon a judgment recovered in Alabama. The defendant plead to the jurisdiction that the judgment was for negligently causing the death of the plaintiff's intestate in Alabama, and that a statute of Illinois provided that no action should be brought in that state for damages occasioned by death occurring in another state in consequence of wrongful conduct. The plaintiff demurred to the plea. The Supreme Court of Illinois held that because of the statute the original action could not have been brought in Illinois and that, therefore, its courts had no jurisdiction of the suit upon the judgment. This Court reversed, holding that, even though the action could not have been brought originally in Illinois, the Alabama judgment was entitled to full faith and credit.

In *Fauntleroy* v. *Lum, supra*, a judgment was rendered in Missouri upon a cause of action, arising on happenings in Mississippi, which would not have warranted suit in the latter state. Nevertheless, this court held that the courts of Mississippi were bound to enforce the Missouri judgment even though the original cause of action not only could not have been maintained there, but was actually illegal and void.

In reason no difference in the *quantum* of proof essential to sustain the burden should limit or prevent the application of *res judicata*, whether the issue may be proven by a mere preponderance or must be supported by clear and convincing evidence or by proof beyond a reasonable doubt. Whether the requisite volume is less or more in one case than in another, it is nonetheless true that the party selecting the proceeding deliberately and on his own ini-

tiative tendered the issue in the chosen proceeding; that he came to trial with full knowledge that the burden rested on him of establishing his charge by a certain volume of proof applicable to the proceeding of his choice; that he voluntarily brought forward his proof and deposited it in his side of the balances which by his own selection were to receive and weigh whatever he might furnish; and that he had every opportunity to know in advance the exact effect of his proof upon the scales chosen and to estimate the probable effect on the same scales of his opponent's proof. Why under such circumstances should not the resulting judicial determination of that issue be as conclusive as if made in a proceeding in which the burden was a lesser one? Why should he be allowed to say "I will use this proceeding in the first instance for the possible advantage of imposing a criminal punishment, but if I fail I will then proceed by establishing the same facts and endeavor to collect the tax and impose a penalty because of fraud in a civil case where I probably will have a better chance to prevail"? And why, if the government wanted the benefit of the easier method of establishing its charge so as to lessen the risk of failure, should it not be compelled to elect and use that kind of procedure in which a mere preponderance, or clear and convincing evidence would have sufficed to prevail upon the issue?

Petitioner says that the Government's right to collect its revenue should not be determined by the technique of the gaming table (Pet. Br. p. 60). To this we agree. But there is no element of "gambling" in the mere obligation to face the recognized doctrine of election of remedies and the prohibition against double jeopardy. Not infrequently a

lawyer has a choice, as between courts of different states, of the one in which he will commence an action, or he may have a choice as between staying in a state court or removing to a federal court. In such a case the careful practitioner will look up the law, both substantive and procedural as declared in each jurisdiction, to determine which affords him the better chance of recovery or defense as the case may be. On such an investigation he often finds a conflict as between the declared law of the respective jurisdictions, and after study he chooses the forum that seems to afford him the better chance to prevail. Occasionally one forum would deny him recovery on his available facts, while another would allow it.

Suppose a careless lawyer without adequate investigation had sued in a court in which he was denied recovery, on facts which might have warranted recovery in another available jurisdiction; that, after such failure, he sues again in the other available court; and that the defendant pleads in bar of this second suit the prior determination in the earlier case. May the plaintiff then successfully urge against the plea, that he lost in the earlier court only because of an unfavorable rule of law in that court? If no question of public policy were involved, or perhaps even if it were, is it not clear that full faith and credit should be given the earlier judgment and that it would defeat the later suit and preclude a retrial of the issue theretofore conclusively determined?

By way of concrete example, Massachusetts has no statutory prohibition which prevents a claimant against an estate from testifying as to a personal conversation with the deceased, whereas such a statute prevails in New York.

Let us assume that a creditor privileged to sue either in New York or Massachusetts on a claim against estate representatives sues in New York; that his only testimony to establish his claim is his own and because he is disqualified under the New York statute he fails to prove his case by competent proof and judgment goes against him. He then sues upon the same claim in Massachusetts where he is a competent witness to prove the claim. The New York judgment is plead as barring the Massachusetts suit. Is it not plain that the application of the full faith and credit doctrine would so bar it? Is it not plain that in every conflict of law (whether substantive in nature of procedural or evidential), as between different jurisdictions, an adverse final judgment in a suit in the jurisdiction whose view of the law was unfavorable to recovery would be a conclusive prior determination so as to prevent a retrial of the same issue in a suit subsequently brought in the forum where the law might have permitted a recovery in the first instance?

Finally the government argues that the application of the doctrine of *res judicata* would force it to elect between the civil and the criminal proceeding. This does not follow except in so far as a double punishment might thereby be imposed. If a criminal proceeding were brought, regardless of its outcome, the government could still assess the tax. Respondent does not question this and this is the extent of the holding in the *Donaldson-Schultz* case cited by petitioner in support of his contention (Pet. Br. p. 63). If petitioner believes that his proof would not justify a criminal prosecution, a civil procedure is available to him. But petitioner cannot ask the support of this court to establish a doctrine which would permit him upon insufficient

proof to bring a criminal prosecution for purposes completely unrelated to his duties as a collector of the revenue, and upon failure of that action again to seek to collect not only the tax but as well the penalty thereon in a later civil proceeding. Were such a procedure sanctioned petitioner might, without fear of any adverse consequence, formulate a policy of proceeding by criminal action in every tax case, to gain thereby whatever benefit might result to the Government from a general disposition on the part of persons threatened with charges of crime and with a criminal trial, to make their peace at any cost regardless of the fact that there might be a real legal question as to the taxability of the items in question. The revenue which petitioner argues so vigorously must be safeguarded, is adequately safeguarded by the existing statutes providing for its collection and for the imposition of punishment in certain cases. Is not the taxpayer also entitled to the protection of his constitutional rights under the age old doctrine of former adjudication?

Application of Argument

Respondent's 1929 income tax return was filed March 15, 1930 (R. 52). On its face it disclosed a claim of a deductible loss of $1,351,875.77 as experienced upon the sale of 18,300 shares of bank stock and that claimed loss wiped out all the income otherwise reported (R. 698-699).

From that date forward the government was bound to know that fact. The very size of the deduction invited examination. The government was bound to examine that return and determine what it conceived to be the proper

tax thereon not later than March 15, 1932. But it could make that examination at any time and if the examination indicated to it a need therefor it could pursue any one or more of the various remedies, criminal or civil, that might be proper under the law. The statutes affording such remedies—beyond those referred to in petitioner's brief—are set forth in an appendix to this brief.

If the government resorted to civil proceedings before March 16, 1932 the question of fraudulent evasion would not affect the recovery of the true tax as such. In that event it could only affect the fifty per centum penalty; and even as to the latter, the question would be an open issue, triable as such, unless cut off by former jeopardy or prior judicial determination. Neither of these bars could intervene, if, regardless of the order in which the criminal or civil proceedings might be brought, the government brought its civil proceedings to an earlier final determination.

The government was bound to know the law. The choice of procedure lay with it, not with the respondent. It made that choice deliberately. If it could have prevailed in the criminal proceeding which it first brought to trial, respondent might have been serving a prison sentence. That the government was defeated does not prevent the consequences of that trial and acquittal as provided by the constitution and by the law. The government is not above either. It may not both eat and keep its cake. Even as against the government, the citizen is entitled to the protection that is his under the law and the constitution.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

WILLIAM WALLACE,
Of Counsel for Respondent.

Dated, January 5, 1938.

APPENDIX

REVENUE ACT OF 1928:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) General rule.—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

SEC. 276. SAME-EXCEPTIONS.

(a) False return or no return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * *

(c) Collection after assessment.—Where the assessment of any income tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

SEC. 277. SUSPENSION OF RUNNING OF STATUTE.

The running of the statute of limitations provided in section 275 or 276 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under section 272[a]) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

* * * *

SEC. 272. PROCEDURE IN GENERAL.

(a) Petition to Board of Tax Appeals.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *

SUPREME COURT OF THE UNITED STATES.

No. 324.—October Term, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Charles E. Mitchell.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 7, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

Revenue Act of 1928, c. 852, Sec. 293, 45 Stat. 791, provides, in dealing with assessment of deficiencies in income tax returns:

"(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid. . . ."

The question for decision is whether assessment of the addition is barred by the acquittal of the defendant on an indictment under Section 146 (b) of the same Act for a wilfull attempt to evade and defeat the tax.

The Commissioner of Internal Revenue found that Charles E. Mitchell of New York had, in his income tax return for the year 1929, fraudulently deducted from admitted gross income an alleged loss of $2,872,305.50 from a purported sale of 18,300 shares of National City Bank stock to his wife; that he had fraudulently failed to return the sum of $666,666.67 received by him as a distribution from the management fund of the National City Company, of which he was chairman; and that these fraudulent acts were done with intent to evade the tax. On December 8, 1933, the Commissioner notified Mitchell that there was a deficiency in his tax return of $728,709.84 and, on account of the fraud, a 50 per cent. addition thereto in the sum of $364,354.92.

Mitchell appealed to the Board of Tax Appeals, which sustained the Commissioner's determination. 32 B. T. A. 1093. Upon a petition for review, the Circuit Court of Appeals concluded that there was ample evidence to support the Board's findings that Mit-

chell had fraudulently made deduction of the loss and that he had fraudulently failed to return the amount received from the management fund; and that, despite the facts hereafter stated, the Board was free to find the facts according to the evidence. It accordingly affirmed the assessment of the deficiency of $728,709.84. But it reversed the Board's approval of the additional assessment of $364,354.92, because of the following facts:

Before the deficiency assessment was made Mitchell had been indicted in the federal court for southern New York under Section 146 (b) of the Revenue Act of 1928, which provides:

"Any person . . . who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than 5 years, or both, together with the costs of prosecution."

The first count charged that Mitchell "unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to wit, $728,709.84, upon his net income for 1929." He was tried on the indictment and acquitted on all the counts. The item of $728,709.84 set out in the first count is the same item as that involved in the deficiency assessed; and both arose from the same transactions of Mitchell. But the addition of $364,354.92 by reason of fraud was not involved in the indictment.

The Circuit Court of Appeals held that the prior judgment of acquittal was not a bar under the doctrine of *res judicata;* and hence it affirmed the assessment of the $728,709.84. But it held that our decisions in *Coffey* v. *United States,* 116 U. S. 436, and *United States* v. *La Franca,* 282 U. S. 568, required it "to treat the imposition of the penalty of 50 percent as barred by the prior acquittal of Mitchell in the criminal action." 89 F. (2d) 873. Mitchell's petition for certiorari to review so much of the judgment as upheld the assessment of the deficiency of $728,709.84 was denied. 302 U. S. —. The Commissioner's petition to review so much of the judgment as denied the 50 per centum in addition was granted, because of the importance in the administration of the revenue laws of the questions presented and alleged conflict in decisions. 302 U. S. —.

First. Mitchell contends that the claim for the 50 percent is barred by the doctrine of *res judicata.* He asserts that all the facts

and intents requisite to the imposition of the 50 per centum addition to the deficiency were put in issue and determined against the Government in the criminal trial, and that hence, under the doctrine of *res judicata* the judgment of acquittal bars it from obtaining a second judgment based upon the same facts and intents. Since this proceeding to determine whether the amount claimed is payable as a tax is a proceeding different in its nature from the indictment for the crime of wilfully attempting to evade the tax, the contention that the doctrine of estoppel by judgment applies rests wholly on the assertion that the issues here presented were litigated and determined in the criminal proceeding. Compare *Tait* v. *Western Maryland Ry.*, 289 U. S. 620, 623. But this is not true.

The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was "merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis* v. *Frick*, 233 U. S. 291, 302. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. *Stone* v. *United States*, 167 U. S. 178, 188; *Murphy* v. *United States*, 272 U. S. 630, 631, 632. Compare *Chantangco* v. *Abaroa*, 218 U. S. 476, 481, 482.[1] Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. *Murphy* v. *United States*, 272 U. S. 630, 632.

The Government urges that application of the doctrine of *res judicata* is precluded also by the difference in the issues presented in the two cases; that although the indictment and this proceeding arise out of the same transactions and facts, the issues in them are not the same; that on the indictment the issue was whether Mit-

[1] United States v. Warner Bros. Pictures, Inc., 13 F. Supp. 614 (E. D. Mo.), affirmed on other grounds, 298 U. S. 643; United States v. Donaldson-Schultz Co., 148 Fed. 581 (C. C. A. 4); United States v. Schneider, 35 Fed. 107 (C. C. D. Ore.); Sanden v. Morgan, 225 Fed. 266, 268-69 (S. D. N. Y.)

chell had "willfully" attempted to "evade or defeat" the tax; that whether he had done so "fraudulently" was not there an issue, *United States* v. *Sharton*, 285 U. S. 518; compare *United States* v. *Murdock*, 290 U. S. 389, 397; and that in this proceeding the issue is specifically whether the deficiency was "due to fraud". Compare *Burton* v. *United States*, 202 U. S. 344, 380. Since there was not even an adjudication that Mitchell did not wilfully attempt to evade or defeat the tax, it is not necessary to decide whether such an adjudication would be decisive also of this issue of fraud. Compare *Hanby* v. *Commissioner*, 67 F. (2d) 125, 129.

Second. Mitchell contends that this proceeding is barred under the doctrine of double jeopardy because the 50 per centum addition of $364,354.92 is not a tax, but a criminal penalty intended as punishment for allegedly fraudulent acts. Unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable.

1. In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure it requires him to make in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil. As stated in *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339:

"In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether Section 293 (b) imposes a criminal sanction. That question is one of statutory construction. Compare *Murphy* v. *United States*, 272 U. S. 630, 632.

Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.[2] Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. Act of July 31, 1789, c. 5, § 36, 1 Stat. 29, 47. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions. *Passavant* v. *United States*, 148 U. S. 214; *United States* v. *Zucker*, 161 U. S. 475; *Hepner* v. *United States*, 213 U. S. 103; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320; *Chicago, B. & Q. Ry.* v. *United States*, 220 U. S. 559, 578; *United States* v. *Regan*, 232 U. S. 37; *Grant Bros. Construction Co.* v. *United States*, 232 U. S. 647, 660; *Murphy* v. *United States*, 272 U. S. 630; *Various Items* v. *United States*, 282 U. S. 577; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 334.[3]

2. The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the tax-

[2] Typical of this class of sanctions is the deportation of aliens. Fong Yue Ting v. United States, 149 U. S. 698; Low Wah Suey v. Backus, 225 U. S. 460; Zakonaite v. Wolf, 226 U. S. 272; Bugajewitz v. Adams, 228 U. S. 585; Ng Fung Ho v. White, 259 U. S. 276; United States ex rel. Bilokumsky v. Tod, 263 U. S. 149. Disbarment is likewise a sanction of this type. Ex parte Wall, 107 U. S. 265. Compare also Hawker v. New York, 170 U. S. 189, 196, 199-200; Board of Trade v. Wallace, 67 F. (2d) 402, 407 (C. C. A. 7); Farmers' Livestock Commission Co. v. United States, 54 F. (2d) 375, 378 (E. D. Ill.).

[3] See also notes 7 to 13, *infra*. The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced. Thus Hepner v. United States, 213 U. S. 103, 111-12, holding that a verdict may be directed for the Government, and United States v. Regan, 232 U. S. 37, 50, holding that the Government need not prove its case beyond a reasonable doubt, distinguished Boyd v. United States, 116 U. S. 616, and Lees v. United States, 150 U. S. 476, holding that the defendant could not be required to be a witness against himself, on the ground that "the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination . . . is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions." 232 U. S. at 50. Compare also Pierce v. United States, 255 U. S. 398, 401.

payer's fraud.[4] In *Stockwell* v. *United States,* 13 Wall. 531, 537, 551, the Court said of a provision which added double the value of the goods:

"It must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed, or purchased, instead of the single value. The act of abstracting goods illegally imported, receiving, concealing or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity. . . .

"The Act of 1823 was, as we have said, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States. . . ."[5]

3. In Sections 276 and 293 it is provided that collection of the 50 per centum addition, like that of the primary tax itself, may be made "by distraint" as well as "by a proceeding in court". If the section provided a criminal sanction, the provision for collection by distraint would make it unconstitutional.[6] Compare *Lipke* v. *Lederer,* 259 U. S. 557; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386. See also *United States* v. *Chouteau,* 102 U. S. 603, 611; *Boyd* v. *United States,* 116 U. S. 616; *Lees* v. *United States,* 150 U. S. 476; *United States* v. *La Franca,* 282 U. S. 568. That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil,

[4] Taylor *v.* United States, 3 How. 197, 210; Bartlett *v.* Kane, 16 How. 263, 274; Cliquot's Champagne, 3 Wall. 114, 145; Dorsheimer *v.* United States, 7 Wall. 166, 173; Passavant *v.* United States, 148 U. S. 214, 221. Compare McDowell *v.* Heiner, 9 F. (2d) 120 (W. D. Pa.), affirmed on opinion below, 15 F. (2d) 1015 (C. C. A. 3); Doll *v.* Evans, 7 Fed. Cas. No. 3,969 (C. C. E. D. Pa.); Stearns *v.* United States, 22 Fed. Cas. No. 13,341 (C. C.).

[5] Compare United States *v.* Claflin, 97 U. S. 546, 552-53.

[6] Even though Congress may not provide civil procedure for the enforcement of punitive sanctions, nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of a civil form of proceeding. Compare United States *v.* Stevenson, 215 U. S. 190, with United States *v.* Regan, 232 U. S. 37, both enforcing the sanction prescribed in 34 Stat. 898. The fact that a criminal procedure is prescribed for the enforcement of a sanction may be an indication that it is intended to be punitive, but cannot be deemed conclusive if alternative enforcement by a civil proceeding is sustained.

not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury,[7] or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant;[8] there is no burden upon the Government to prove its case beyond a reasonable doubt,[9] and it may appeal from an adverse decision;[10] furthermore, the

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[7] Passavant *v.* United States, 148 U. S. 214; Oceanic Steam Navigation Co. *v.* Stranahan, 214 U. S. 320; Elting *v.* North German Lloyd, 287 U. S. 324, 327-28; Lloyd Sabaudo Societa *v.* Elting, 287 U. S. 329, 334; cf. Hamburg-American Line *v.* United States, 291 U. S. 420; Osaka Shosen Kaisha Line *v.* United States, 300 U. S. 98. Compare also San Souci *v.* Compagnie Francaise de Navigation A Vapeur, 71 F. (2d) 651, 653 (C. C. A. 1); Lloyd Royal Belge, S. A. *v.* Elting, 61 F. (2d) 745, 747 (C. C. A. 2); Navigazione Libera Triestina *v.* United States, 36 F. (2d) 631, 633 (C. C. A. 9); Clay *v.* Swope, 38 Fed. 396 (C. C. D. Ky.). And see cases cited in note 2, *supra*.

Administrative determination of sanctions imposed by the income tax laws has likewise been upheld. Berlin *v.* Commissioner, 59 F. (2d) 996, 997 (C. C. A. 2); McDowell *v.* Heiner, 9 F. (2d) 120 (W. D. Pa.), aff'd on opinion below, 15 F. (2d) 1015 (C. C. A. 3); Board *v.* Commissioner, 51 F. (2d) 73, 76 (C. C. A. 6); Wickham *v.* Commissioner, 65 F. (2d) 527, 531-32 (C. C. A. 8); Little *v.* Helvering, 75 F. (2d) 436, 439 (C. C. A. 8); Bothwell *v.* Commissioner, 77 F. (2d) 35, 38 (C. C. A. 10); Doll *v.* Evans, Fed. Cas. No. 3,969 (C. C. E. D. Pa.).

[8] Hepner *v.* United States, 213 U. S. 103; Four Packages *v.* United States, 97 U. S. 404, 412; Chicago, B. & Q. Ry. *v.* United States, 220 U. S. 559, 578. Compare United States *v.* Thompson, 41 Fed. 28 (C. C. S. D. N. Y.); United States *v.* Atlantic Coast Line Ry., 182 Fed. 284 (S. D. Ga.).

[9] Lilienthal's Tobacco *v.* United States, 97 U. S. 237, 265-67, 271; United States *v.* Regan, 232 U. S. 37; Grant Bros. Const. Co. *v.* United States, 232 U. S. 647, 660. Compare New York Cent. & H. R. R. R. *v.* United States, 165 Fed. 833, 839 (C. C. A. 1); Grain Distillery No. 8 *v.* United States, 204 Fed. 429 (C. C. A. 4); Pocahontas Distilling Co. *v.* United States, 218 Fed. 782, 786 (C. C. A. 4); United States *v.* Louisville & N. Ry., 162 Fed. 185 (S. D. Ala.), aff'd, 174 Fed. 1021 (C. C. A. 5); St. Louis-S. W. Ry. *v.* United States, 183 Fed. 770, 771 (C. C. A. 5); United States *v.* Illinois Cent. Ry., 170 Fed. 542, 545-46 (C. C. A. 6); Atchison, T. & S. F. Ry. *v.* United States, 178 Fed. 12, 14 (C. C. A. 8); Missouri, K. & T. Ry. *v.* United States, 178 Fed. 15, 17-18 (C. C. A. 8). Compare also Act of March 2, 1799, c. 22, § 71, 1 Stat. 627, 678; Locke *v.* United States, 7 Cranch 339, 348; Cliquot's Champagne, 3 Wall. 114, 143-44.

[10] Compare United States *v.* Claflin, 97 U. S. 546; United States *v.* Zucker, 161 U. S. 475; United States *v.* Regan, 232 U. S. 37. See also United States *v.* Baltimore & O. S. W. Ry., 159 Fed. 33, 38 (C. C. A. 6), modified, 220 U. S. 94; United States *v.* Louisville & N. Ry., 167 Fed. 306, 307-08 (C. C. A. 6); United States *v.* Illinois Cent. Ry., 170 Fed. 542, 545 (C. C. A. 6). Compare United States *v.* Sanges, 144 U. S. 310.

Similarly, if the Government is successful it may recover costs as in other civil suits. Grant Bros. Const. Co. *v.* United States, 232 U. S. 647, 665. See also United States *v.* Southern Pac. Co., 172 Fed. 909, 911 (C. C. D. Ore.); United States *v.* Minneapolis, St. P. & S. S. M. Ry., 235 Fed. 951, 952-53 (D. Minn.).

defendant has no constitutional right to be confronted with the witnesses against him,[11] or to refuse to testify;[12] and finally, in the civil enforcement of a remedial sanction there can be no double jeopardy.[13]

4. The fact that the Revenue Act of 1928 contains two separate and distinct provisions imposing sanctions, and that these appear in different parts of the statute, helps to make clear the character of that here invoked.[14] The sanction of fine and imprisonment prescribed by Section 146 (b) for wilfull attempts "in any manner to evade or defeat any [income] tax", introduced into the Act under the heading "Penalties", is obviously a criminal one. The sanction of 50 per centum addition "if any part of any deficiency is due to fraud with intent to evade tax", prescribed by Section 293 (b), introduced into the Act under the heading "Additions to the Tax", was clearly intended as a civil one. This sanction, and other additions to the tax are set forth in Supplement M, entitled "Interest and Additions to the Tax". The supplement includes, besides Section 293 (b), Sections 291, 292, 293 (a) and 294. Section 291 prescribes a 25 per centum addition for failure to make and file a return; Section 292 prescribes interest at the rate of 6 per cent. per annum upon the deficiency from the date prescribed for payment of the tax; Section 293 (a), an addition of 5 per centum if the deficiency "is due to negligence, or intentional disregard of rules and regulations but without intent to defraud"; and Section 294 prescribes an addition to the tax of 1 per centum

[11] United States *v.* Zucker, 161 U. S. 475; Grant Bros. Construction Co. *v.* United States, 232 U. S. 647, 660.

[12] Compare United States ex rel. Bilokumsky *v.* Tod, 263 U. S. 149, 155. We do not construe Boyd *v.* United States, 116 U. S. 616, or Lees *v.* United States, 150 U. S. 476, as holding to the contrary where the sanction involved is remedial, not punitive. See note 3, *supra.*

[13] Murphy *v.* United States, 272 U. S. 630; Various Items *v.* United States, 282 U. S. 577. Compare Egner *v.* United States, 16 F. (2d) 597 (C. C. A. 3); Wood *v.* United States, 204 Fed. 55, 57 (C. C. A. 4); United States *v.* St. Louis-S. W. Ry., 184 Fed. 28, 32 (C. C. A. 5); Slick *v.* United States, 1 F. (2d) 897, 898 (C. C. A. 7). See also United States *v.* Three Copper Stills, 47 Fed. 495, 499 (D. Ky.); United States *v.* Olsen, 57 Fed. 579, 582-86 (N. D. Cal.); Castle *v.* United States, 17 F. Supp. 515, 518-20 (Ct. Cl.). Compare Hanby *v.* Commissioner, 67 F. (2d) 125 (C. C. A. 4).

[14] The Board of Tax Appeals said in Mitchell *v.* Commissioner, 32 B. T. A. 1093, 1136: "A careful study of the two sections convinces us that they are basically different in character and were enacted for wholly different purposes. The language of the two sections differs widely and contemplates situations which may require entirely dissimilar proof."

per month in case of non-payment. Obviously all of these "Additions to the Tax" were intended by Congress as civil incidents of the assessment and collection of the income tax.[15]

Third. Mitchell insists that *Coffey* v. *United States,* 116 U. S. 436, requires affirmance of the judgment; the Government argues that this case is distinguishable, and, if not, that it should be disapproved. The Circuit Court of Appeals, citing *Stone* v. *United States,* 167 U. S. 178, 186-189, and later cases, recognized that the rule of the *Coffey* case "did not apply to a situation where there had been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof"; but construing Section 293 (b) as imposing a penalty designed to punish fraudulent tax dodgers "and not as a mere preventive measure", it thought that the *Coffey* case and *United States* v. *La Franca,* 282 U. S. 568, required it "to treat the imposition of the penalty of 50 per cent. as barred by the prior acquittal of Mitchell in the criminal action." Since we construe Section 293 (b) as imposing a civil administrative sanction, neither case presents an obstacle to the recovery of the $364,354.92, the 50 per centum addition here in issue.

Reversed.

Mr. Justice McReynolds is of opinion that the judgment of the Circuit Court of Appeals should be affirmed.

Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[15] Section 104 imposes a somewhat similar additional tax of 50 per cent. of the net income in the case of corporations formed or availed of for the purpose of avoiding surtax on their shareholders through improper accumulation of surplus. Compare United Business Corp. v. Commissioner, 62 F. (2d) 754 (C. C. A. 2).